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ARTICLE

Pragmatic Monism: The Practice of the Indonesian Constitutional Court in Engaging with International Law

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Abstract

The relationship between international and domestic law in Indonesia is the subject of prolonged debate caused by the silence of the Indonesian Constitution on the choice between monism and dualism, which affects constitutional adjudication. This article discusses how the Constitutional Court engages with international law in its decisions and how the debate between monism and dualism is affected by it. It argues that the practice of the Court falls neither within the traditional scope of monism nor dualism but tends to be eclectic, which can be termed pragmatic monism. Here, the Court considers an international treaty part of domestic law upon ratification. However, its contents are only applicable if they are consistent with the Constitution, the highest law in the country. Nevertheless, such pragmatism is not without consequences where the consistency of the constitutional system as a whole is compromised for the instrumentality of its individual decisions on societal well-being.

Keywords: Constitutional adjudication; international law; Constitutional Court; Indonesia; Pragmatic monism

The relationship between international law and the domestic legal system generally has been a matter of debate among legal scholars. Traditionally, they fall into two categories: monism, which embraces the unity between international law and national law, and dualism, which conceives the two as separate systems of law. The relationship between international and domestic constitutional law is considered non-exclusive, albeit with a different nature. Until this recent development, international law has remained a coordinating legal order as opposed to (national) constitutional law, which has a subordinating nature.[1] This means its rules are legally binding, based primarily on a consensus among its subjects, particularly states.[2]

[1] Ian BROWNLIE, *Principles of Public International Law*, 2nd ed. (Oxford: Clarendon Press, 1973) at 36; Timothy HILLIER, *Principles of Public International Law* (New York: Cavendish Publishing, 1999) at 2–5; see also Louis HENKIN et al., *International Law: Cases and Materials* (Eagan, Minnesota: West Publishing Company, 1987) at 1; See also Nicole ROUGHAN, "Mind the Gaps: Authority and Legality in International Law" (2016) 27 European Journal of International Law 329 at 334; Torben SPAAK, "Kelsen on Monism and Dualism" in Marko Novakovic, ed., *Basic Concepts of Public International Law: Monism & Dualism* (Belgrade: University of Belgrade, 2013), 322; Jorge NUNEZ, "Cosmopolitanism and Universal Law" (9 September 2021), online: SSRN https://ssrn.com/abstract=3920273 at 2, 3, and 14.

[2] Although, until recently, various subjects have been universally accepted as subjects of international law besides the states (i.e., international organizations, the International Committee of the Red Cross, belligerents,

The debate between monism and dualism has also implicated the practice of constitutional interpretation. In the US, Australia, Canada, and several other countries where the use of international law in constitutional adjudication is not uncommon, this practice has been met with criticism, especially in the US, on at least three grounds.[3] First, foreign and international law are not legitimate sources of law in constitutional adjudication. It has been argued that a constitution must be viewed as an expression of national interest;[4] therefore, using foreign laws, including international law, as references in constitutional adjudication are illegitimate since they are not enacted by the elected representatives of the people, making the process undemocratic and unrepresentative of national values.[5] Second, it is impossible for foreign experts or law practitioners to appropriately comprehend how context and history influence the development of another state's law in deciding cases in that particular state.[6] The third criticism concerns the judicial method of selecting and using foreign materials. It says that on every constitutional issue, a wide range of views and legal positions exist worldwide. In the absence of an accepted methodology to determine how those materials should be selected, judges may arbitrarily cite foreign materials for the sole reason they support their personal views.[7] However, such criticism has been resolved by the chosen approach of each state in its constitution on how international law should enter into the domestic legal system of the state concerned.

Indonesia is no exception in incorporating international law provisions into its constitutional adjudication. What is particularly challenging in the context of Indonesia – like Vietnam and China[8] – is the fact that no provision in the Constitution can be referred to as a constitutionally relevant explanation for interpreting the nation's view on the relation between its national law and international law. Article 11 of the 1945 Constitution states only that:

(1) With the approval of the DPR, the President may declare war, make peace, and conclude treaties with other countries.
(2) The President, in making other international agreements that will produce an extensive and fundamental impact on the lives of the people which is linked to the state financial burden and/or that will require an amendment to or the enactment of a law, shall obtain the approval of the House of Representatives.
(3) Further provisions regarding international agreements shall be regulated by law.

insurgents in a conflict, and even – to some limited extent – individuals), states remain the main actors in the exercise of international relations under international law. As an additional note, the fact that binding international law is primarily based on the consensus of its subjects (in this case, states) and its lack of a lawmaking body and law enforcement institutions are among other reasons why John Austin, a prominent 19th-century English legal theorist, persistently declined to consider international law as law because – based on his analytical jurisprudence approach and his thinking as a legal positivism theorist – it does not match the "nature" of law as a command. According to Austin, "international law" is nothing but a collection of "rules of positive morality". For further details, see John Austin, *The Province of Jurisprudence Determined* (Cambridge: Cambridge University Press, 2001) at 7.

[3] Diane ZHANG, "The Use and Misuse of Foreign Materials by the Indonesian Constitutional Court: A Study of Constitutional Court Decisions 2003–2008", Department of Law, University of Melbourne, Thesis, 2010 at 7.

[4] The late Justice Antonin Scalia, for example, said that using foreign legal materials "can never be relevant to an interpretation of – to the meaning of – the U.S. Constitution". See Antonin SCALIA, "Keynote Address: Foreign Legal Authority in the Federal Courts" (2004) 98 Proceedings of the ASIL Annual Meeting 305.

[5] Melissa A. WATERS, "Justice Scalia on the Use of Foreign Law in Constitutional Interpretation: Unidirectional Monologue or Co-Constitutive Dialogue" (2004) 12 Tulsa Journal of Comparative and International Law 149.

[6] Zhang, *supra* note 3 at 8.

[7] *Ibid*.

[8] See Tannetje BRYANT and Brad JESSUP, "Fragmented Pragmatism: The Conclusion and Adoption of International Treaties in Vietnam" in John GILLESPIE and Pip NICHOLSON, eds., *Asian Socialism & Legal Change: The Dynamics of Vietnamese and Chinese Reform* (Canberra: ANU Press, 2005), 288.

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To follow up on the third point of Article 11, Indonesia enacted Law Number 24 of 2000 on International Agreements, which also aims to fill the gap because it has not ratified the 1969 Vienna Convention on the Law of Treaties. However, the law that primarily derives its provisions from the Vienna Convention on the technical aspects of treaty-making remains silent on the foundational aspects governing the relationship between international and domestic law. Moreover, the debate on this issue among Indonesian scholars is inconclusive, making it difficult to assess from a doctrinal point of view.[9] Consequently, a clear conclusion cannot be drawn as to whether Indonesia belongs to the monist or the dualist theories mentioned above. Empirically, as Simon Butt observed, this uncertainty has provided an advantage for the government to deflect criticism from the international community and its citizens on its compliance with international obligations.[10] In constitutional adjudication, this uncertainty may provide room for government agencies in international law cases to shop for different theories that best suit their interests. From the Court's perspective, the absence of consistency and coherency in the government's legal arguments may bring difficulties if the Court has to decide on a case with an unpredictable outcome.

This reluctance to choose should be seen as the influence of the ambivalent legacy toward international law. As a newly independent state, Indonesia under Sukarno perceived international law as colonial machinery. Therefore, it considered it "unfriendly toward Indonesia and a foreign element to the newly-founded Indonesian legal framework".[11] This was despite several statesmen's positive attitude toward international law. Mohammad Hatta, the first Vice President, in his 1950 speech, stated that "[b]ased on the assumptions accepted in the relations between states, the treaty is superior to the Constitution".[12] Similarly, Sutan Sjahrir saw international law, especially as it related to human rights, as an integral part of his anticolonial nationalism.[13] Furthermore, Suharto's authoritarian regime, on the one hand, perceived international law, especially international economic law, as an essential guide to attracting foreign investors to the country. On the other hand, it was suspicious of international law related to human rights because it might potentially destabilize the regime's legitimacy.

However, the lack of explicit constitutional provisions and doctrinal references to the relationship between national and international law has directed attention away from the government and the courts to determine whether the judicial bodies' practice would clarify this lacuna. In this context, the Constitutional Court is particularly relevant because it has been the forum in which questions on constitutional matters are brought by state institutions and citizens, which may include questions related to the application of international law at the domestic level. Before the establishment of the Constitutional Court, such questions on applicability had been tackled by the Supreme Court; for example, in the landmark case of Mandalawangi, where a question was raised concerning whether an international legal principle could be applied in governing the conduct of the government and its agencies.[14] In its decision, the Supreme Court considered the application of

[9] Simon BUTT, "The Position of International Law within the Indonesian Legal System" (2014) 28 Emory International Law Review 1; see also Mochtar KUSUMAATMADJA and Etty R. AGOES, *Pengantar Hukum Internasional*, 2nd ed. (Banding: Penerbit Alumni, 2021) at 94.

[10] Butt, *ibid*.

[11] Damos AGUSMAN, "The Dynamic Development on Indonesia's Attitude Toward International Law" (2015) 13 Indonesian Journal of International Law 3.

[12] Mohammad Hatta, as cited in the Indonesian Constitutional Court's Decision No. 13/PUU-XVI/2018 at 147.

[13] Paul BIJL, "Human Rights and Anticolonial Nationalism in Shajrir's Indonesian Contemplations" (2017) 29 Law & Literature 247.

[14] The case concerned a landslide in Mandalawangi, West Java, in which the victims filed a class action against the Perhutani, a state-owned company that managed the production forest estate in the area, and the

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an international environmental law principle (the precautionary principle) as an attempt "to fill a legal vacuum" in Indonesian environmental law because "the enforcement of environmental law shall be undertaken based on international legal standards".[15] However, as the Supreme Court does not have authority in constitutional adjudication, it does not address the constitutionality of international law's application to the domestic legal system in its decisions.

Hence, this article discusses the practice of the Constitutional Court in engaging with international law. The article contributes to the inconclusive debate on the relationship between international law and national law[16] within the context of constitutional adjudication by looking at Indonesia's experience. Indeed, as a relatively new institution, the Constitutional Court of Indonesia has often faced complex cases with ambiguities, conflicting provisions, and lacunae in legal doctrines. As a result, the Court resorts to international law to decide such cases, through which it attempts to shed light on the unclear relationship between international law and domestic law in the country. In this attempt, this article will argue that the direction set by the Court does not tidily fall within the traditional scope of monism or dualism but tends to be eclectic, which can be termed pragmatic monism. Here, the Court considers an international treaty to be procedurally part of domestic law upon ratification, but its contents are only applicable if they are consistent with the Constitution, the highest law in the country. However, such pragmatism is not without consequences; consistency at the system level is compromised by the instrumentality of its individual decisions in the real world.

This article is structured as follows: first, it revisits the debate on monism and dualism to build a conceptual approach of pragmatic monism in constitutional adjudication. Second, the Indonesian Constitutional Court and its authority are explained. It is then followed by the pragmatic monist approach of the Indonesian Constitutional Court in engaging with international law. Several cases will be discussed here to understand how constitutional judges applied international legal norms or customary international law to constitutional adjudication. Finally, a short conclusion is given, stressing the implication of this finding to the debate on monism and dualism in Indonesia.

I. Pragmatic Monism in Constitutional Adjudication

The relationship between international law and domestic law has been characterized by two main theories: monism and dualism. The theory of monism comprises two theses. The first is the unity thesis, which sees international and municipal or domestic law as part of an integral system of law. The second is the primacy thesis that governs the hierarchy between international and domestic law, especially when both laws are contradictory. In this regard, the question of primacy is answered differently by two camps: (1) the primacy of state law, which regards international law to be domestic law's subordinate, and (2) the primacy of international law, which holds that "international law is superior

government on the basis that the defendants had failed to manage the forest sustainably which then led to the landslide causing losses for the victims. In this case, the plaintiffs used the precautionary principle, a principle in international environmental law, as the basis of their claims against the defendants. See Andri WIBISANA, "The Development of the Precautionary Principle in International and Indonesian Environmental Law" (2011) 14 Asia Pacific Journal of Environmental Law 169.

[15] Decision of the Supreme Court No. 1794K/Pdt/2004 concerning *Perhutani and others v. Dedi and others* at 84.

[16] See Butt, *supra* note 9. In this article, he traces the doctrinal aspect of the monism/dualism discourse in Indonesia and the courts' practice in this regard. He concludes that uncertainty remains the main feature of the Indonesian attitude toward international law. See also Kusumaatmadja and Agoes, *supra* note 9; Agusman, *supra* note 11; John LUMBANTOBING, "The 1958 New York Convention in Indonesia: History and Commentaries Beyond Monism-Dualism" (2019) 9 Indonesia Law Review 222.

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to or more basic than municipal law".[17] According to Starke, following the Kelsenian science of law, the primacy of international law is more scientific than the primacy of state law because the primacy of state law "raises fundamental inconsistencies of principle which in the last resort can only be reconciled by saying that international law as the law does not exist".[18] Indeed, the primacy of international law has been accepted predominantly by states that adopt a monist theory.

In contrast to monism, dualism embraces the separation thesis. Here, international and national law are regarded as two separate branches of law operating in different spheres.[19] However, this theory does not mean to reject the possible application of international law in the domestic sphere. According to Shaw, in the context of treaty adoption, the monist and dualist theories are reflected in two different doctrines: the doctrine of incorporation and the doctrine of transformation.[20] Based on monism, the doctrine of incorporation considers international law to be "self-executing", meaning that a treaty comes into effect immediately after being ratified by the state; by contrast, the doctrine of transformation, reflecting dualism, considers the treaty as coming into effect only once it has been enacted through a domestic legal instrument.[21] According to the doctrine of transformation, the applicability of international law within a domestic legal sphere is only possible when a further step after ratification is taken by transforming it into domestic law.[22] Hence, the transformation thesis is the second feature of the theory of dualism.

Whether a state is monist or dualist is often explicitly stated in its constitution. This is because the Constitution serves as a fundamental law of its national legal system and is a hallmark of the state's independence and sovereignty among members of the international community. Independence and sovereignty are of particular importance in international relations, for without them, a state will not be recognized as an international legal entity with the competency to act as a subject of international law in its fullest sense. In this context, it is part of its sovereignty to choose how an international legal obligation shall be applied at the domestic level. Once a state is a party to a treaty, observance of a treaty becomes an international legal obligation for the state concerned. It is the manifestation of the *pacta sunt servanda* principle, enshrined in Article 26 of the Vienna Convention on the Law of Treaties, according to which, "*Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*" The Convention further emphasizes that a state that is a party to a treaty cannot invoke its national law as a justification for not observing the treaty.[23] A state's international obligation to observe all treaties to which it is a party is not limited to states who are parties to the Vienna Convention on the Law of Treaties. It is a general principle of law that has been universally accepted by civilized nations. Such an obligation, however, does not necessarily mean that international law – for example, a treaty – is hierarchically superior to national law unless this is clearly stated in the constitution of a state.

[17] Malcolm SHAW, *International Law*, 8th ed. (Cambridge: Cambridge University Press, 2017) at 98.

[18] Joseph G. STARKE, "Monism and Dualism in the Theory of International Law" in Stanley PAULSON and Bonnie LITSCHEWSKI-PAULSON, eds., *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Oxford: Oxford University Press, 1999), 537 at 547.

[19] Gerald FITZMURICE, "The General Principles of International Law Considered from the Standpoint of the Rule of Law" (1957) 92 Recueil de Cours 1; Jeffrey DUNOFF et al., *International Law: Norms, Actors, Process* (Boston: Aspen Publishing, 2020) at 210.

[20] Shaw, *supra* note 17 at 105.

[21] Bryant and Jessup, *supra* note 8 at 300.

[22] Rosalie BALKIN, "International Law and Domestic Law" in Sam BLAY, Ryszard PIOTROWICZ, and Martin TSAMENYI, eds., *Public International Law: An Australian Perspective* (Melbourne: Oxford University Press, 1997), 119.

[23] Article 27 of the Convention says, "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article 46."

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However, it becomes challenging in constitutional adjudication if the Constitution does not provide an explicit provision on the relationship between international law and domestic law. One may argue that as the Constitution may not cover all fundamental aspects of the state building, this is precisely why the Constitutional Court was established to answer legal questions not explicitly articulated in the Constitution. Although this observation may be accurate in general, having a constitutional provision on international-domestic law interactions will, at the very least, lighten the caseload for the Constitutional Court to adjudicate cases involving international law that have increasingly become common in a globalized world where domestic law derives its provisions from international treaties or conventions. In addition, over-adjudicated matters on the application of international law within a domestic legal system may lead to inconsistent interpretations of the Constitutional Court that, in turn, hinder legal certainty and predictability of the legal system.

This condition has made it possible to apply either monism or dualism strictly. As this article will demonstrate, it may lead to pragmatic monism, an approach of judges in constitutional adjudication based on a partial and pragmatic application of monism in the applicability of international law within a domestic legal system. It is partial monism in that, on the one hand, it retains the first thesis of monism (the unity of international law and domestic law) that direct application of international law, including treaties and customary international law, is possible after ratification. On the other hand, the second thesis of monism (the primacy of international law) rejects the idea of the superiority of international law in relation to domestic law. It tends to see that international law is not a subordinating legal order but rather a coordinating one. Here, the relationship between international law and domestic law is not seen through a Kelsenian "pyramid" but what Armin von Bogdandy calls "coupling" ("a system of linkages"),[24] which makes it possible for judges to seek adequate provisions, concepts, or doctrines from different legal orders in supporting their arguments. It demonstrates a seemingly contradictory stance insofar as it accepts the doctrine of monism and that international law has direct applicability in constitutional adjudication, but, following the *Medellin* case in the U.S., it rejects "an unqualified doctrine of the supremacy of international law over domestic law".[25]

It is pragmatic because a legal pragmatic approach to adjudication informs it. Legal pragmatism has four main elements: contextual, anti-foundational, instrumental, and perspectival.[26] From a contextual perspective, it conceives that a constitution as a man-made instrument is created and enforced through a political process in a particular political forum; hence, it will never be perfect, not only in the sense that it is not complete but also in the sense that it always needs legitimation of its time.[27] In Wheare's words, "[a] constitution is indeed the resultant of a parallelogram of forces – political, economic, and social – which operate at the time of its adoption".[28] Such a conclusion is derived from the view that, by the time it was drafted and adopted, a constitution tended to reflect dominant

[24] Armin VON BOGDANDY, "Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law" (2008) 3 International Journal of Constitutional Law 398.

[25] Massimo LANDO, "Intimations of Unconstitutionality: The Supremacy of International Law and Judgement 238/2014 of the Italian Constitutional Court" (2015) 78 Modern Law Review 1036.

[26] See Brian E. BUTLER, "Legal Pragmatism" (14 October 2022), online: Internet Encyclopaedia of Philosophy https://iep.utm.edu/leglprag/; Suman ACHARYA Formalism vs. Pragmatism in Legal Philosophy (26 March 2020) online: SSRN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3423036#:~:text=Abstract,implementation%20of%20doctrine%20and%20principles at 8–9; Caroline Bermeo NEWCOMBE, "Textualism: Definition, and 20 Reasons Why Textualism is Preferable to Other Methods of Statutory Interpretation" (2022) 87 Missouri Law Review 142 at 189–90.

[27] Jimly ASSHIDDIQIE, *Pokok-Pokok Hukum Tata Negara Indonesia Pasca Reformasi (The Basics of Constitutional Law in the Post-Reform Era of Indonesia)* (Jakarta: Bhuana Ilmu Populer, 2007) at 604.

[28] Kenneth WHEARE, *Modern Constitutions*, 2nd ed. (Oxford: Oxford University Press, 1966) at 67.

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beliefs or interests or a compromise among various existing beliefs or interests of society at the time.[29] Thus, constitutional adjudication interprets the Constitution based on the political, economic, and social context from which a constitutional dispute emerges.

The pragmatic approach also views the instrumental role of law as "producing the best result for the future" instead of emphasizing the consistency of precedent as the judges' paramount duty.[30] Dworkin, in his chapter entitled *Pragmatism and Personification*, which is specifically devoted to addressing the question of legal pragmatism, sceptically comments that "the pragmatist thinks judges should always do the best they can for the future, in the circumstances, unchecked by any need to respect or secure consistency in principle with what other officials have done or will do".[31] For pragmatic judges, interpreting a constitution does not simply mean an activity of "measuring" a concrete case using the text of a constitution, but is instead a quest for the answer to the question: how are we supposed to understand a constitution and the purposes it aims to achieve? The answer to such a quest is pivotal in constructing a platform for debates or argumentations on essential issues of significant impact on the final result.[32] In other words, interpreting a constitution is a way or method to elaborate on concepts contained in the text of a constitution, the result of which will be accepted or recognized as part of constitutional law that can be elaborately explained and applied by courts.[33] Thus, the question of purpose is important in constitutional interpretation.

Moreover, the perspectival element here is related to the idea that a legal phenomenon is monolithic in that it can only be resolved by a predetermined model of argumentation.[34] Interpretation of a constitution becomes more important from the perspective of protecting citizens' constitutional rights, for a constitution is designed to protect individuals or groups of citizens from certain decisions that will be taken by the majority of citizens, even when the majority acts on behalf of the public or for the common interest.[35] Such protection is conducted by formulating certain constitutional limitations or restraints. However, problems arise as, to some extent, provisions of a constitution are not always clearly formulated. As Dworkin says, referring to the US Constitution:

> Some of these constitutional restraints take the form of reasonably precise rules, like those that require a jury trial in federal criminal proceedings or, perhaps, the rule that forbids the national Congress to abridge freedom of speech. However, other constraints take the form of what is often called "vague" standards, for example, the provision that the government shall not deny men due process of law or equal protection of the laws.[36]

[29] A similar point is made by Jed Rubenfeld when he asks of the U.S. Constitution: "How can a two-hundred-year-old legal text, enacted by a series of majority votes under conditions very distant from our own, exert legitimate authority in the present? How can it possibly bind a majority today? A constitution of this sort is a scandal. It is an offense against reason, against democracy – against nature itself." See Jed RUBENFELD, "Legitimacy and Interpretation" in Larry ALEXANDER, ed., *Constitutionalism: Philosophical Foundations* (Cambridge: Cambridge University Press, 1998), 194.

[30] Richard POSNER, "Pragmatic Adjudication" (1996) 18 Cardozo Law Review 4.

[31] Ronald DWORKIN, *Law's Empire* (Cambridge: The Belknap Press of Harvard University Press, 1986) at 161.

[32] See further, Anthony MASON, "The Interpretation of a Constitution in a Modern Liberal Democracy" in Charles SAMPFORD and Kim PRESTON, eds., *Interpreting Constitutions: Theories, Principles, and Institutions* (Alexandria, NSW: Federation Press, 1996) 13 at 14.

[33] Keith E. WHITTINGTON, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Kansas: University Press of Kansas, 1999) at 2–5.

[34] Butler, *supra* note 26.

[35] See Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at 133.

[36] *Ibid*.

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Consequently, to make a constitution work in protecting the constitutional rights of its citizens, the so-called "original intent" approach is not always appropriate, for it will lead us out of context and will not facilitate the comprehension of a constitution as constitutional integrity. Dworkin then proposes an approach that he fondly calls the "moral reading of the constitution"; that is, an approach by which a constitution should be understood as a set of moral principles to find the constitutional integrity of the Constitution.[37] The anti-foundational tenet of pragmatism is to "avoid extremes and use whatever works".[38] Pragmatic judges play a role in identifying alternative models that work better in a given context. Based on this perspective, this article will demonstrate how the Indonesian Constitutional Court applied the monist theory selectively, based on a pragmatic approach to adjudication. Before this examination, it is crucial to provide a brief contextual background of the Court.

II. The Constitutional Court in Indonesia

The Constitutional Court of the Republic of Indonesia was established in 2003 by Law Number 24 of 2003 of the Constitutional Court (hereinafter referred to as CC Law).[39] Its creation was part of a fundamental change[40] in Indonesia's constitutional system following the amendment to the 1945 Constitution.[41] The amendment of the Constitution itself resulted from the so-called "Reform Movement", pioneered by Indonesian students using the momentum of the monetary crisis at the end of the 1990s that severely hit many Asian countries, including Indonesia. It successfully forced President Suharto to step down, marking the collapse of his more than three-decade-long authoritarian regime.

The establishment of the Court has been considered a new landmark of constitutional democracy in the post-authoritarian era. This is because the Court guarantees the practice of a constitutional government based on democracy[42] and the rule of law,[43] emphasizing the checks and balances principle among branches of state power. It further (and importantly) safeguards the protection of citizens' constitutional rights, which are pivotal to a constitutional democratic state.[44] Hence, many scholars and pro-democracy activists celebrated the emergence of the Court as an outcome of a long and hard-won battle for democracy and the rule of law in the country.[45]

[37] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1996) at 12; For further elaboration on the interpretation of the Constitution, see Dewa Palguna, *Pengaduan Konstitusional: Upaya Hukum Terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara (Constitutional Complaint: Legal Remedy for Violation of Citizen's Constitutional Rights)* (Jakarta: Sinar Grafika, 2013) at 280.

[38] Brian TAMANAHA, "Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Sociolegal Studies, and the Fact-Value Distinction" (1996) 41 American Journal of Jurisprudence 321.

[39] The Court was the 78th constitutional court (or equivalent institution) in the world. The Austrian Constitutional Court (*Der Osterreichische Verfassungsgerichtshof*), founded in 1920, was considered by many experts as the first constitutional court. For further details, see, for example, Herman SCHWARTZ, *The Struggle for Constitutional Justice in Post-Communist Europe* (Chicago: University of Chicago Press, 2000) at 17.

[40] Mauro CAPPELLETTI, *The Judicial Process in Comparative Perspective* (New York: Oxford University Press, 1989) at 136.

[41] Tom GINSBURG, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003).

[42] John FEREJOHN and Pasquale PASQUINO, "Rule of Democracy and Rule of Law" in José María MARAVALL and Adam PRZEWORSKI, eds., *Democracy and the Rule of Law* (Cambridge: Cambridge University Press, 2003), 242.

[43] Herbert HAUSMANINGER and John A. EWALD, *The Austrian Legal System* (Vienna: Manz Verlag Wien, 1998).

[44] For further comparisons, see Trevor L. BROWN and Charles R. WISE, "Constitutional Courts and Legislative-Executive Relations: The Case of Ukraine" (2004) 119 Political Science Quarterly 143.

[45] For instance, the late Adnan Buyung Nasution, a prominent lawyer and an outspoken rights campaigner, once said, in a televised interview commemorating the first anniversary of the Court, that the foundation of

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Theoretically and constitutionally, by virtue of the Preamble[46] and Article 1, paragraphs (2) and (3) of the Constitution, the establishment of the Court is a logical consequence of the Constitution.[47] Thus, the fundamental spirit of the Constitution,[48] upon which the Republic of Indonesia is instituted, is that Indonesia shall be a constitutional democratic state where upholding the Constitution is its first and foremost prerequisite.[49] Conceptually, the idea of a constitutional democratic state[50] may be implemented either in the form of a "parliamentary model" (parliament is considered to be supreme and serves as the guardian of the Constitution) or a "constitutional model" (the Constitution is considered to be supreme, not parliament). While the "parliamentary model" does not require establishing a separate institution to safeguard the Constitution, the "constitutional model" involves establishing a constitutional court to safeguard the Constitution.[51]

The establishment of the Court makes clear that Indonesia is now a constitutional democratic state practicing the "constitutional model". Under Article 24C paragraph (1) of the Constitution, the Court has jurisdiction to adjudicate, at the first and final stage, cases concerning the review of constitutionality of laws (or judicial review); disputes on conflicts of authority among state organs whose authorities are provided by the constitution; the dissolution of political parties;[52] and disputes on the result of a general election.[53] Under paragraph (2) of the same provision, the Court is also obliged to give

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the Court had never been imagined would come into existence even in our wildest imagination. See "Sejarah Terbentuknya Mahkamah Konstitusi RI" (History of the Establishment of the Constitutional Court of the Republic of Indonesia), Mahkamah Konstitusi RI (13 Agustus 2014), online: https://www.youtube.com/watch?v=6x_Vlw29DVc.

[46] According to Kelsen, a constitution's preamble contains a solemn introduction expressing political, moral, and religious ideas promulgated by the Constitution. From a preamble, we can also identify whether the state to be founded under the Constitution is designed to uphold the will of the people or simply the will of a ruler installed by the grace of God; see Hans KELSEN, *General Theory of Law and State* (New York: Russell & Russell, 1961) at 260.

[47] The Preamble states that the state built under the Constitution shall be based on the principle of popular sovereignty – or, in other words, a democratic state. Furthermore, Article 1 paragraph (2) of the Constitution stipulates that sovereignty shall be in the hands of the people and shall be exercised pursuant to the Constitution, while Article 1 paragraph (3) stipulates that Indonesia shall be based on the rule of law.

[48] Saafroedin BAHAR, *Risalah Sidang Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia (BPUPKI), Panitia Persiapan Kemerdekaan Indonesia (PPKI), 29 Mei 1945–19 Agustus 1945 (Minutes of Meetings of Board of Inquiry for Independence Preparation Measures, Preparatory Committee for Indonesian Independence 29 May 1945–19 August 1945)* (Jakarta: Sekretariat Negara Republik Indonesia, 1992).

[49] Historically, a similar conclusion can also be drawn by meticulously tracing back the debate during the drafting of the Constitution by the nation's founding figures in 1945; see further, A.B. KUSUMA, *Lahirnya Undang-Undang Dasar 1945 (The Birth of the 1945 Constitution)* (Jakarta: Faculty of Law, University of Indonesia, 2004) at 35.

[50] Tim KOOPMANS, *Courts and Political Institutions: A Comparative View* (Cambridge: Cambridge University Press, 2003).

[51] As to reasons why establishing a special court (i.e., the Constitutional Court), whose primary function is to be the guardian of the Constitution, is more suitable in civil law countries instead of giving such a function to an already established court as practised in the US, see Hans Kelsen, "Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution" (1942) 4 Journal of Politics 183.

[52] Insofar as the dissolution of political parties is concerned, the government is the only party with standing to file a petition on the issue. A political party may be dissolved if its ideology, principles, goals, programmes, or activities contradict the Constitution. Hence, the petitioner (i.e., the government) must clearly describe why the petition is filed. The Court shall decide the case within 60 days. If the petition is granted, the government shall follow up the Court's decision by annulling the registration of the political party concerned.

[53] The Court's jurisdiction to adjudicate cases concerning disputes on the results of general elections is stipulated in Article 22E paragraph (2) of the Constitution. The article states that general elections shall be organized to elect members of the House of Representatives, the Regional Representative Council, the President, the Vice President, and the Regional House of Representatives.

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a ruling on an opinion of the House of Representatives, which considers whether the President and/or Vice President have (has) committed crimes expressly described in the constitution or no longer meet(s) the qualifications as President and/or Vice President – a constitutional mechanism popularly known as the impeachment of the President and/or the Vice President.[54] The Court's decisions are final and binding.

The constitution's provisions concerning the Constitutional Court's function were elaborated further in the CC Law. For example, the law lays down the rules on standing for constitutional review. In more detail, the ones who have standing to file a petition on the constitutionality of law are those who consider their constitutional rights or authorities have been infringed upon by law (a specific article, paragraph, or part of the law), namely: (1) an individual citizen of Indonesia (including group of citizens who have a common interest on the issue); (2) a traditional legal entity as long as it still exists and is in line with the development of society and the principle of the Unitary State Republic of Indonesia; (3) public or private legal entities; and (4) state institutions.[55] The petitioner must, in the first place, clearly describe the constitutional right(s) deemed to be infringed by the enacted law (or part of it) and why the law (or part of it) is considered unconstitutional. If the Court believes the petition is justified, it will grant it. At the same time, it will declare that the impugned law is unconstitutional in whole or in part and that it no longer has legally binding power.[56]

Aside from challenging the constitutionality of a law in substance, a petition on the constitutionality of a law may also be filed to challenge the constitutionality of the procedures for enacting a law.[57] Specifically, suppose the Court thinks the procedures for enacting a law are unconstitutional. In that case, it shall rule that the petition is granted and simultaneously declare that the law is unconstitutional and has no legally binding power.[58] A party with legal standing on disputes of state authority is a state organ whose authority is given by the Constitution.[59] The petitioner must clearly describe in the petition the disputed authority and the state organ to be challenged by the petition.[60] The Court may make a temporary ruling ordering the petitioner and/or the respondent party to temporarily halt the exercise of the disputed authority pending the Court's decision.[61] Suppose the Court considers that the petition is justified. In that case, the petition will be granted, and the Court shall simultaneously and expressly declare that the challenged state organ has no right to exercise such authority.[62]

Quantitatively, to date, the Court has adjudicated as many as 3,414 cases. These include 1,573 cases concerning the review of the constitutionality of laws, 26 disputes on

[54] Pursuant to Article 7A of the Constitution, the President and/or Vice President may only be impeached during their tenure by the People's Consultative Assembly based on the recommendation of the House of Representatives if it considers that the President and/or Vice President committed acts of treason, corruption, bribery, other high crimes, committed deplorable acts, or no longer meet(s) the qualifications as a President and/or Vice President. However, according to Article 7B of the Constitution, before the People's Consultative Assembly makes such a motion of impeachment, the House of Representatives must first submit a petition to the Court asking for the Court's ruling. If the Court rules that the opinion of the House of Representatives proves justified. In that case, the House of Representatives will ask the People's Consultative Assembly to hold a plenary session to impeach the President and/or Vice President. The Court shall hand down its decision on the issue within 90 days from the day of the petition registration at the Court's register.

[55] CC Law, Article 51, paragraph (1).

[56] CC Law, Article 56 paragraphs (2), (3) in conjunction with Article 57 paragraph (1).

[57] CC Law, Article 51 paragraph (2)(a).

[58] CC Law, Article 56 paragraph (4) in conjunction with Article 57 paragraph (2).

[59] CC Law, Article 61 paragraph (1).

[60] CC Law, Article 61 paragraph (2).

[61] CC Law, Article 63.

[62] CC Law, Article 64, paragraphs (2) and (3).

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authority among state organs, 676 disputes on the result of general elections, and 1,136 disputes on the result of local elections.[63] Many of them were complex cases where the existence of domestic law and legal doctrines had been inadequate to build a legally sound argument. Based on the classic maxim of *iura novit curia* (the court knows the law), the Court has to provide a legal argument despite the existing limitations in the domestic legal system. In doing so, it resorts to international law provisions and doctrines as a reference.

As observed by Zhang, since its beginning, the Court has often cited international law. It mainly includes reference to provisions of covenants, conventions, or treaties as part of the rationalization (*ratio decidendi*) of its decisions. The decisions concern cases on petitions to review the constitutionality of laws when the petitions were granted or overruled. According to a study conducted by Zhang, during the first five years of its existence (2003–2008), out of seventy-eight cases concerning the review of constitutionality laws, 86% of the Court's decisions cited at least one foreign source of law as its reference. Furthermore, the study reveals that the Court has cited thirty-four provisions of conventions or treaties, legislation, and cases from twenty-six foreign countries and judicial decisions of supranational courts or tribunals.[64] Citations of international law can also be found in the opinions of individual justices when the justices concerned submitted their dissenting opinions (showing their disagreement with the ruling) or in their concurring opinions (meaning they agree with the outcome but have their reason or argumentation for reaching such ruling).

III. Engaging with International Law

In his article, Butt classifies the Constitutional Court's treatment of international law into three different approaches. The first is "the weak-use approach", where the Court refuses or ignores the parties' use of international law arguments. The second is the "qualified-use approach", in which the Court "gives more credence to international law, but attributes no real influence to it". This approach is akin to what, in international law and EU law literature, is called the principle of consistent interpretation in the sense that both "construe a rule of national law in the light of international law".[65] The third is the "strong-use approach", where the Court relies "heavily on international legal principles and interpretations from international bodies to help construe the Indonesian Constitution, the statute being reviewed in the case, or both".[66] This approach is akin to the principle of direct effect, which "allows a national court to apply a rule of international law as an independent rule of decision in the national legal order, when that rule is not transposed or is inadequately transposed, to domestic law".[67] Based on these three approaches, Butt concludes that Indonesia is "formally monist" but practically dualist. In this section, Butt's conclusion will be revisited to examine whether the practice of the Indonesian Constitutional Court can be characterized as dualist. For this purpose, several cases concerning constitutional adjudication are discussed, including how the Constitutional Court perceives international law in its decision-making.

[63] Constitutional Court of the Republic of Indonesia, "Lembaga Pengawal Konstitusi" (The Guardian of the Constitution) (10 October 2022), online: MKRI https://www.mkri.id/index.php?page=web.Perkara2&menu=4.

[64] Zhang, *supra* note 3.

[65] Gerrit BETLEM and Andre NOLLKAEMPER, "Giving Effect to Public International Law and European Community Law before Domestic Courts: A Comparative Analysis of the Practice of Consistent Interpretation" (2003) 14 European Journal of International Law 569.

[66] Butt, *supra* note 9 at 15–16.

[67] Betlem and Nollakaemper, *supra* note 66 at 571.

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A. Embracing the Unity Thesis

As mentioned above, the first thesis of monism is the unity thesis, which regards international and municipal law as parts of the same legal system. Here, an international agreement or treaty is conceived as entering into force in a domestic legal system immediately after ratification by the state. In the practice of constitutional adjudication in Indonesia, many instances demonstrate the application of the unity thesis by the Constitutional Court. It can be seen in the Yogyakarta Special Region Law and the Film Law cases.

The Yogyakarta Special Region Law case concerns Law Number 13 of 2012 on the Special Status of the Province of Yogyakarta. Article 18 para. (1)(m) of the law stipulates that "Candidates for Governor and candidates for Deputy Governor are citizens of the Republic of Indonesia who must fulfil the following requirements: m. submit a curriculum vitae containing, among others, a history of education, work, siblings, wife, and children." The requirement to provide information about "wife" indicates that candidates should be male, hence closing the opportunity for a woman to run as a candidate. In this case, the petitioners were a group of women's rights activists who challenged a provision in the law they argued was discriminatory against women.[68] In its consideration, the Court affirmed the petitioners' arguments that the provision in question was not only unconstitutional domestically but also contradictory to the international legal obligations stipulated in the Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), to which Indonesia was a party.[69] The Court elaborated that:

> ...as part of the international community, Indonesia has also ratified many international law instruments that forbid discrimination, such as the Covenant on Civil and Political Rights (ICCPR)... In connection with women, the ICCPR even considers explicitly the importance of emphasising the equal rights between men and women in the enjoyment of rights guaranteed by the ICCPR...More specifically, as to prohibition on discrimination against women, Indonesia has also been a party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)... State Parties of CEDAW...have also agreed to take the necessary steps or efforts in any field, especially in politics, social, economic, and culture, including efforts through legislation, to guarantee the full development and advancement of women to guarantee women in the application and enjoyment of fundamental human rights and freedoms based on the foundation of equality with men.[70]

The Film Law case concerns the censorship provisions in the 1992 Film Law, in which the court referred to international human rights law. This case is critical to note because it further explains the Court's consistency when dealing with cases involving human rights issues protected by the 1945 Constitution and the international law covenants or conventions to which Indonesia is a party. In this case, Annisa Nurul Shanty, a singer and film actress, and other petitioners considered several provisions in Law Number 8 of 1992 on film regulation matters pertaining to censorship that violates the right to freedom of expression protected by the Constitution.[71] The Court also referred to international

[68] Case Concerning Discrimination against Women [2016] Decision of the Constitutional Court No. 88/PUU-XIV/2016.

[69] *Ibid*.

[70] *Ibid*., at 309–11.

[71] Case Concerning Censorship in Law Number 8 of 1992 on Film [2007] Decision of the Constitutional Court No. 29/PUU-V/2007.

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instruments that allowed such a limitation to the right, namely the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights that had been ratified in 2005, stating that:

> Accordingly, either internationally/universally or nationally, on certain conditions, one's rights can be limited. Limitations might be applied even to non-derogable rights; for instance, the right not to be prosecuted based on retroactive law might be set aside in cases concerning gross human rights violations, such as crimes against humanity and genocide.[72]

The Court overruled the petition, arguing that the right to freedom of expression was not absolute but was subject to constitutional limitation stipulated in Article 28J paragraph (2) of the Constitution. The Court affirmed that Law Number 8 of 1992 on Film was enacted during the authoritarian regime, which aimed to control freedom of expression. However, it considered that if the law were declared unconstitutional, this would create a legal vacuum in governing film, including its censorship provisions, which were still needed to ensure the film's conformity to morality, religious values, security, and public orders. As a result, the Court concluded that the law was "conditionally constitutional" until a new law on film was enacted.[73] The Court's reference to the international law instrument here is meant to support the Court's opinion that freedom of expression is not part of non-derogable rights; hence, it is subject to limitations contained in the Constitution and the ICCPR. In this case, the Court paradoxically used the ICPPR as the legal basis for limiting the rights to freedom of expression while justifying the need to retain the authoritarian regime's Film Law due to its instrumental role in maintaining "morality, religious values, security, and public order", vague standards that were often mobilized by the authoritarian regime to justify the suppression of freedom of expression.[74] Consequently, this demonstrates the Court's favourability toward the instrumentality of the law at the expense of its consistency with the constitutional provisions on human rights.

Furthermore, on any occasion, the Court may also reference a treaty not yet ratified by Indonesia, as evidenced by the Anti-Terrorism Law case. This case involves a constitutional adjudication filed by Masykur Abdul Kadir and others, convicted of the 2002 Bali Bombing.[75] In this case, the Federal Government of Indonesia enacted a regulation in lieu of Law Number 2 of 2002 to be applied retrospectively to the 2002 Bali Bombing case due to the vacuum of law governing terrorism, which the petitioners considered unconstitutional. In deciding the case, the Court cited several international "soft law" instruments: the Universal Declaration of Human Rights, the Declaration on Measures to Eliminate International Terrorism, and the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism. In addition, the Court also used several "hard law" instruments that Indonesia had not ratified at the time of the case, including the ICCPR, the International Convention for the Suppression of Terrorist Bombings, and the International Convention for the Suppression of the Financing of Terrorism.[76]

[72] *Ibid*., at 223.

[73] *Ibid*., at 232–7.

[74] Case Concerning Censorship, *supra* note 72 at 223.

[75] Case Concerning Terrorism Law [2003] Decision of the Constitutional Court No. 013/PUU-I/2003.

[76] The International Covenant on Civil and Political Rights was finally ratified in 2005, and both terrorism-related conventions were also ratified by Indonesia in 2006, following the Second Bali Bombing in October 2005.

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The outcome of the proceeding was a split decision. Five justices favoured the petitioners, while the other four submitted their dissenting opinion using international law materials, including the Nuremberg Tribunal's decisions on perpetrators of war crimes during the Second World War, to support the retrospective application of the law. However, the majority of justices cited Article 11, paragraph (2) of the Universal Declaration of Human Rights, Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Its Eight Protocols, Article 4 paragraph (2), Article 15 paragraphs (1) and (2) of the International Covenant on Civil and Political Rights, Article 9 of the American Convention on Human Rights, along with Articles 22, 23, and 24 of the Rome Statute, and reasoned that:

> the application of the retroactive principle in criminal law is merely an exception that is only allowed and applied to cases of gross violation of human rights as serious crimes, which guarantees non-derogable rights. Meanwhile, according to the Rome Statute of 1998, acts that are considered gross violations of human rights are crimes of genocide, crimes against humanity, war crimes, and crimes of aggression, whereas, according to Article 7 of Law Number 39 of 1999 on Human Rights, acts which are considered gross violations of human rights are only crimes of genocide and crimes against humanity. According to the Rome Statute or Law Number 39 of 1999, the Bali bombing of 12 October 2002 could not yet be categorized as an extraordinary crime to which the retroactive principle might be applied. However, it remains within the category of a very cruel ordinary crime, which can still be dealt with by the existing criminal law.[77]

From their consideration, they demonstrated that, although the act of terrorism was indeed a serious crime, it was not regarded as an extraordinary crime. The majority regarded the non-retrospective principle as absolute based on the 1945 Constitution and the international human rights instruments, stressing that "[i]f terrorism is deemed to be against human rights, legal provisions and measures to combat it cannot override human rights".[78] A specific reference to the ICCPR underpins a stance concerning the absolute and universal nature of the non-retroactive principle as a part of non-derogable rights.[79] In their deliberation, however, they provided a formalistic definition of the non-retrospective principle, stating:

> (L)egislation can be said to be retrospective if it is effectively implemented backward, which means to regulate an act committed by a person before the legislation is enacted. Based on this definition, Law Number 16 of 2003...that was enacted on 18 October 2022 to the Bali Bombing on 12 October 2002 is a retrospective act (ex post facto law).[80]

Accordingly, the application of a retroactive law to the 2002 Bali Bombing case was legally unjustifiable; hence, the law should be declared unconstitutional.

By contrast, the minority judges published a dissenting opinion against this formalistic definition. In their deliberation, they provided a substantive matter of the principle, arguing that, based on international law instruments used as a reference, including Article 15 of the ICCPR, "it is clear that...the essence of the non-retrospective application is the

[77] Case Concerning Terrorism Law, *supra* note 76 at 43–4.
[78] Case Concerning Terrorism Law, *supra* note 76 at 44.
[79] Case Concerning Terrorism Law, *supra* note 76 at 40.
[80] *Ibid*., at 36.

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protection of criminalization against an act that was not regarded as a crime when the act was committed".[81] Hence, they concluded that Law Number 16 of 2003 was not applied retrospectively because the act of the 2002 Bali Bombing had been regarded as a criminal offence by the existing criminal code, and the law did not increase its punishment since such an offence was sanctioned for the death penalty at the maximum.

Despite the split in legal reasoning, in this case, there was no debate on the applicability and effects of international instruments; the majority and minority justices appeared to rely heavily on those instruments in making their considerations, regardless of their status of ratification. Therefore, this case demonstrates the Court's strong-use approach to international law, where international law rules directly affect the case. Due to a perspectival debate, it decided, based on the majority opinion whose argument did not consider the substantive explanation of the non-retrospective application provided by several international legal instruments, in order to maintain the absolute notion of Article 28I of the Constitution, which stipulates "the right not to be charged based on a retrospective application of law as a human right that cannot be derogated in any circumstances".

In brief, these case studies demonstrate how, in a constitutional adjudication concerning fundamental human rights, the Constitutional Court approves the applicability of international human rights standards in the domestic legal system. Here, the Court directly refers to provisions of international human rights law instruments, intending to back up its reasoning when considering the constitutionality (or the unconstitutionality) of national law provisions concerning human rights submitted to it. Hence, it might be conceived that the Court has impliedly construed Indonesia as monist in terms of the relation between international law and national or domestic law.

In human rights-related constitutional adjudication, one may point to Article 7 of the 1999 Human Rights Law[82] to justify the necessary use of international law. For instance, Butt, in his response to Agusman's characterization of Article 7 of the Human Rights Law as an indication of monism,[83] argues that such an article is an indication of dualism because, to be a monist country, the article is unnecessary as international law directly applies to the domestic legal system.[84] Although this debate on the textual reading of Article 7 is beyond the scope of this article, a close reading of Article 7 shows that the article does not indicate monist or dualist tendencies. This is because the article concerns the customary international law rule about the exhaustion of domestic remedies,[85] which is also applied in monist and dualist countries.[86] Moreover, from the practice of the

[81] *Ibid*., at 58.

[82] Article 7 of Human Rights Law stipulates that: "(1) everyone has the right to use all national legal remedies and international forums for all violations of human rights guaranteed by Indonesian law and international human rights law that the Republic of Indonesia has accepted; (2) the provisions of international law that have been accepted by the Republic of Indonesia concerning human rights are primarily the responsibility of the government".

[83] See Damos Agusman, *Hukum Perjanjian Internasional: Kajian Teori dan Praktik Indonesia* (Bandung: Refika Aditama).

[84] Butt, *supra* note 9 at 8.

[85] Elucidation of Article 7 of Human Rights Law states that "this Article is intended to mean that those who wish to uphold their human rights and fundamental freedoms are obliged to exhaust all such remedies at the national level first (exhaustion of local remedies) before resorting to forums at either the regional or international level, except when resorting to either regional or international forums, unless there is there is no response from the national legal forum".

[86] See Cançado TRINDADE, "Exhaustion of Local Remedies in International Law and the Role of National Courts" (1978) 17 Archiv des Völkerrechts 333, at 350–5, where he discusses the X and Y v. Belgium (1963) and the X v. Federal Republic of Germany (1963) cases to demonstrate the use of the rule of exhaustion of local remedies in monist countries; see Kate EASTMAN, "Human Rights Remedies: A Guide" (1992) 17 Alternative Law Journal 169; Brenda GUNN, "Remedies for Violations of Indigenous Peoples' Human Rights"

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Constitutional Court, a direct application of international human rights standards in constitutional adjudication has never referred to Article 7 of the 1999 Human Rights Law as the legal basis.[87] Thus, considering the practice of the Court, Article 7 of Human Rights Law cannot be used to indicate that Indonesia is either monist or dualist because the Court never uses it as a reference in adopting international human rights instruments.

B. The Selective Application of the Primacy of International Law Thesis

The second thesis of monism is the primacy of international law in relation to domestic law. However, in the practice of the Indonesian Constitutional Court, this is not usually the case. In the Yogyakarta Special Region and Film Law cases, the Court referred to the content of international treaties that Indonesia ratified. Even if it also referred to an unratified international treaty in the Anti-Terrorism Law case, in other cases, the Court may question a ratified treaty's contents in the light of the Constitution. This is demonstrated by the ASEAN Charter case involving Law Number 28 of 2008 on the Ratification of the ASEAN Charter. The Charter, which contains provisions on the application of the ASEAN Free Trade Area (AFTA), was regarded as unconstitutional by the petitioners – a group of civil society organizations and individual citizens – because a "single market and production base" community, pursued through the AFTA, contradicted the Indonesian welfare state model.[88] Here, the petitioners used a monist perspective; once an international agreement has been ratified, it directly affects national law. In order to demonstrate the authority of the Constitutional Court to examine the constitutionality of the substantive merits of the charter, they claimed that the ASEAN charter, as the annexe to Law Number 28 of 2008, should be regarded as an inseparable part of the law.[89]

> By contrast, the government utilized a dualist argument. It claimed that "no rule of Indonesian law (including the 1945 Constitution) states explicitly that ratification statutes also transform provisions of an international agreement into national law...For Indonesia, the norms in the agreement can be effectively implemented at the national level only after they are transformed into a specific national legal instrument".[90]

The government insisted that the implementation and efficacy of the ASEAN Charter are not determined by the 2008 Ratification of the ASEAN Charter Law because this law is only an expression of legal consent given by the House of People's Representatives to be bound by the Charter; it did not transform the Charter into national law.[91] Consequently, the government concluded that the Constitutional Court had no authority to examine the constitutionality of the contents of the ASEAN Charter because it had not yet become applicable within the domestic legal system.

The Court's decision in this case has two notable points. The first point concerns a question of the Court's authority to examine the constitutionality of a treaty. Here, the

(2019) 69 University of Toronto Law Journal 150. Both authors touch on the rule of exhaustion of local remedies in the context of human rights violations in dualist states, namely Australia and Canada, respectively.

[87] Indeed, the reason behind this is hard to identify, but it can be assumed that it is perhaps due to the equal position of the Human Rights Law and the law being constitutionally examined in the hierarchy of laws; hence, the use of Article 7 as an instrument to examine the validity of an equal norm will be problematic.

[88] Case Concerning the Ratification of ASEAN Charter [2011] Decision of the Constitutional Court No. 33/PUU-IX/2011.

[89] *Ibid*., at 22.

[90] *Ibid*., at 96.

[91] *Ibid*., at 97.

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Constitutional Court took a stance in favour of the petitioners' arguments, considering that the ASEAN Charter is an attachment and an inseparable part of Law Number 38 of 2008 on Ratification of the ASEAN Charter; hence, it has the authority to examine the contents of the charter concerned.[92] If the Court did not perceive the ASEAN Charter to have legal effect at the domestic level upon ratification, the Court would not have examined the Charter's contents in the first place. Thus, the willingness to undertake a constitutional test against the Charter indicates the Court's affirmation of monism's doctrine of incorporation, in which an international agreement becomes part of the national legal system upon ratification.

The second point concerns the substantive merits of the case, namely, the constitutionality of the Charter's content in creating a single and free-market regional community. On this issue, the Court overruled the petitioners' claim because, although binding, the ASEAN Charter only consists of general and macro provisions related to trade that had been agreed upon by the members of ASEAN. Accordingly, it still requires more detailed measures to be taken by each government; thus, if the measures violate constitutional rights, the Charter could be reopened for a new constitutional examination and terminated if it harms the national interest.[93] In the context of the debate concerning the application of international law in Indonesia, the Court's reasoning seems to conceive the treaty as procedurally part of the domestic law following its ratification; however, its contents are applicable as long as they align with the Constitution. Hence, this can be seen as the Court's attitude to set aside monism's second thesis of the primacy of international law in which an international treaty can be annulled if it contradicts the Constitution.

An interesting observation from constitutional adjudication is the government's changing stance between monism and dualism. In the case of the ASEAN Charter, the government argued against the petitioners using a dualist stance. By contrast, the government, in the case of the 2000 International Agreements Law, claims that Indonesia is a monist country for at least three reasons: (1) historically, the Indonesian legal system was inherited from the Dutch legal system, and the Netherlands itself has always been a monist country;[94] (2) from a doctrinal perspective, the 2000 International Agreement Law is heavily influenced by the monist teachings of Mochtar Kusumaatmadja, a prominent law professor in Indonesia;[95] and (3) at the state practice level, Indonesia is more likely a monist country because it directly applies an international treaty upon its ratification, demonstrated by the guarantee of diplomatic immunity. Indonesia did not transform the 1961 and 1963 Vienna Conventions into a national legal instrument; it applied international human rights provisions directly.[96] This demonstrates the inconsistency of the Indonesian government and its stance on case-by-case bases. The Court should have been asked to clarify the government's inconsistency toward international law, as expressed in the International Agreements Law case, had the Court looked back at its past decision in the ASEAN Charter case.

Furthermore, the contextual element of legal pragmatism in constitutional adjudication was also evidenced by the ASEAN Charter case, where the treaty's content would be examined to consider the constitutional question's political, economic, and social context. As discussed above, in this case, the Court also provided an opportunity to re-examine the ASEAN Charter if the operative measures taken by the government

[92] *Ibid*., at 181.

[93] *Ibid*., at 194–6.

[94] Case concerning Law of International Agreements [2018] Decision of the Indonesian Constitutional Court's Decision No. 13/PUU-XVI/2018 at 146.

[95] *Ibid*.

[96] *Ibid*., at 148.

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contradicted the national interests enshrined by the Constitution. Thus, the Court denies the supremacy of international law over national law regarding national interests. However, the judgment does not elaborate on what "national interest" means. The ambiguity of the concept of "national interest" may justify the politically, economically, and socially contextualized application of the treaty's contents at the domestic level. In addition, it can also be instrumentalized by the Court to invalidate the political and legal decisions of the executive and legislative branches to be bound by a treaty if its application is deemed to conflict with what is constitutionally considered the national interest.

Moreover, in the 2000 International Agreements Law case, the Court maintained the importance of the case-by-case basis of constitutional interpretation. It states that:

> [r]egarding in what cases or under what circumstances an international agreement ... requires changes or the formation of [domestic] laws, this cannot be determined in a limitative manner but must be assessed on a casuistic basis based on considerations and developments in national and international legal needs.[97]

This demonstrates the anti-foundational tendency of the Court by recusing itself from producing a solid constitutional interpretation that can be referred to by governments and citizens in predicting the outcomes of constitutional adjudication.

C. Consequences of Pragmatic Monism

From the Constitutional Court's point of view, although none of the cases discussed in this article indicates the refusal of international law as a source on dualist grounds, the extent to which international law outweighs national law is inconclusive. In this regard, the pragmatic attitude of the Court comes into the picture. This pragmatism is not without consequences. Indeed, one may argue that the indeterminacy between monism and dualism in Indonesia may not entirely be negative. From citizens' viewpoints, this uncertainty opens opportunities to shop for legal provisions or doctrines available in international law to provide a compelling argument supporting their claim before the Court. This can be seen in the Customary Forest case, where a coalition of indigenous peoples' groups demanded the exclusion of customary forests under the state forest category. Due to the lack of legal protections for the rights of indigenous peoples within the domestic legal system, they resorted to international law, especially the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and the 1989 ILO Convention No. 169, including the use of the Free, Prior, and Informed Consent (FPIC) principle, which had not been recognized by Indonesian law.[98] Moreover, the indeterminacy may also be relevant within the context of the current development of international law. An observation by Petersen is worth quoting here at length:

> The international legal order has moved away from being one monolithic system. Instead, we observe the emergence of a certain heteronomy of international tribunals and institutions varying in the extent of their competencies and the design of their decision-making procedures. The reception of decisions of these institutions by national legal orders cannot be subject to a one-fits-all approach. Instead, the task of domestic constitutional judges has become more complex ... Instead of

[97] *Ibid*., at 256.

[98] See Case Concerning the Customary Forest Estate [2012] Decision of the Constitutional Court No. 35/PUU-X/2012.

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> distinguishing monist from dualist legal orders, we should thus instead focus on the strategy a constitutional court chooses to cope with this challenge.[99]

However, the unintended consequences of a pragmatic approach should not be overlooked. A politically-, economically-, or socially- contextualized decision may make it challenging to come up with a more philosophical consideration as the basis for transferable *ratio decidendi* from one case to similar cases in the future. The anti-foundational tendency of a pragmatic approach may lead more adventurous judges to move beyond the Constitution's original intent by utilizing a range of sources to build a convincing argument. Hence, the text of the Constitution becomes an open-ended object of interpretation. Moreover, as the pragmatic approach focuses on a case-by-case basis to assess the instrumentality of its decisions in the real world, the coherency and consistency of the whole system are compromised. In this regard, the Constitutional Court, as an unelected institution, found its legitimacy on the presumption of impartiality, where the ability to demonstrate objectivity in its decision to maintain the coherence of the constitutional system is paramount. The instrumentalist tendency of the pragmatic approach may distort this legitimacy because it involves judges' subjective assessments of the instrumentality of their decisions in society. Dworkin, for instance, is also concerned with this consequence of pragmatism, which may lead to the question of "the principle of integrity in adjudication".[100] Disregarding the decision concerning the ASEAN Charter case when adjudicating the International Agreements Law case, a pragmatic judge tends to ignore the past decision through which coherency is built in order to pursue the community's future well-being. However, pragmatism does not define what constitutes this future well-being; hence, it leaves open the question about the personal quality of judges.

This quality may include their knowledge, background, and experience in international law and its implementation in domestic law. Regarding knowledge, as far as the Indonesian Constitutional Court is concerned, only two justices received in-depth training on international law.[101] In the cases mentioned above, the judges merely repeated what had been said at the international level without adding their reasoning as to why such a practice should be accepted in the context of a particular case in the domestic legal system or whether there are additional limitations to the non-application of specific rules, principles, or practices of international law in the Indonesian legal system. Here, the role of constitutional judges was central because they are the actors who exercise more freedom to choose how to use (or not to use) international law in constitutional adjudication. This freedom has been made possible by the influence of the civil law tradition, which does not embrace the doctrine of the binding force of precedent – the foundational principle in the classical method of judicial decision-making.

IV. Conclusion

In international law literature, legal scholars have debated the relationship between international law and domestic law. Such debates have also implicated the practice of constitutional interpretation, which attempted to resolve through a chosen theory – either monism or dualism – how and when international law should enter into the domestic legal system of

[99] Niels PETERSEN, "The Reception of International Law by Constitutional Courts through the Prism of Legitimacy" (2009) Preprints of the Max Planck Institute for Research on Collective Goods, No. 2009/39 at 23–4.

[100] Dworkin, *supra* note 31 at 167.

[101] The only two justices who obtained master's degrees in international law were the late Justice A.S. Natabaya (from Indiana University School of Law, Bloomington, USA) and I Dewa Gede Palguna (from the Post Graduate Programme, Padjadjaran University Faculty of Law, Bandung, Indonesia).

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the states concerned. However, this problem has remained unresolved in Indonesia because the Constitution remains silent on whether it follows monism or dualism. Hence, because no constitutional provision can be referred to clarify the relationship between international law and domestic law, questions on this matter have been brought to the Constitutional Court, especially when they are related to constitutional provisions.

This article examines several constitutional adjudication cases to understand the practice of the Indonesian Constitutional Court in utilizing international law. The cases discussed above are among the most important rulings of the Court when using international law as a reference in constitutional adjudication. Far from being exclusive, these decisions have been selected in order to demonstrate the impact of international law in the elaboration of the theoretical reasoning or argumentation of the Court's practice, particularly in the context of constitutional interpretation and its implications on the uncertain relationship between international law and domestic law within the Indonesian legal system.

Based on the assessment of the practice of the Constitutional Court, instead of being practically dualist, this article finds that the practice of the Court does not fall easily within the traditional conception of either monism or dualism. Instead, it leans toward pragmatic monism in the sense that the first thesis of monism (the unity thesis) is embraced by the Court in which international law is directly incorporated in order to build convincing constitutional interpretations and, more importantly, as a legal source to fill the legal vacuum within the domestic legal system. This practice demonstrates Indonesia's complementary relationship between international law and national law. However, the second thesis of monism (the primacy thesis), where international law is seen as superior to domestic law, is contextualized by the Court on a case-by-case basis. Hence, the attitude of the Court toward the second thesis of monism appears to fall within the standards of a pragmatic approach to adjudication: contextual, anti-foundational, instrumental, and perspectival.

Indeed, such pragmatism is not without consequences. The consistency at the system level is compromised for the instrumentality of its individual decisions in the real world. It, in turn, may lead to a question of its legitimacy because the legitimacy of a judicial power, including the Constitutional Court in this domain, is precisely based on the ability to show its decision's impartiality, coherency, and predictability. Thus, it remains to be seen how the Indonesian Constitutional Court will prevent and address the consequences of pragmatic monism on the constitutional system to uphold its legitimacy while simultaneously being politically relevant to the general public.

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