

Research Article

The Indonesian Constitutional Court Approaches the Proportionality Principle to the Cases Involving Competing Rights

Tanto Lailam^{1,3*}, Putri Anggia^{2,3}

¹Faculty of Law, Universität zu Köln, Germany

²Faculty of Law, Universitat Autònoma de Barcelona, Spain

³Fakultas Hukum, Universitas Muhammadiyah Yogyakarta, Indonesia

* tanto_lailam@umy.ac.id

ABSTRACT

The research focuses on the proportionality analysis of the competing socio-economic rights in the Indonesian Constitutional Court / Mahkamah Konstitusi Republik Indonesia (the MKRI). It is motivated by the unclear concept/model of proportionality analysis in Indonesia and its application by the court. The research method used was normative legal research with statutory and case approaches. The MKRI's general practices need to be more structured, unsystematized, and uncomprehensive to implement with four stages: legitimate aims, suitability, necessity, and balancing. It applies a model that refers to the legal objectives based on Pancasila and the 1945 Constitution. It declares the balance of fundamental rights and obligations of citizens based on the values of the godhead, humanity, unity, democracy, and social justice. Hence, some decisions used proportionality analysis, specifically in economic rights. Its implications create a balance of legal norms and integratively value legal certainty, justice, and legal expediency.

Keywords: Proportionality Analysis; Constitutional Court; Socio-Economic; Competing Rights.

A. INTRODUCTION

Judicial review is an authority of constitutional judges to supervise or assess the process of legislation-making in formal judicial review and to review the substance of the content of the law, including articles, paragraphs, and phrases in a material judicial review system (Lailam, & Andrianti, 2022). It is the most important factor in any legislative change (Laksono et.al, 2017), a legal instrument to control political dynamics in the democratic rule of law (Safa'at, 2022), and significantly consolidate national and local democracies in Indonesia (Satriawan, & Mokhtar, 2015).

Theoretically, judicial review is divided into several legal mechanisms: (1) abstract judicial

review, (2) concrete judicial review or constitutional questions, and (3) constitutional complaints. Its mechanisms are usually the authority of the constitutional courts or an equivalent court worldwide, but only some courts in a particular country have these three authorities. Abstract judicial review is a power of the constitutional court to decide on the constitutionality of laws and regulations (Lailam, 2020). It differs from concrete judicial review, which tests the law as it applies to a particular case in the litigation process at an ordinary court (Corkin, 2010). Meanwhile, constitutional complaints can be submitted after all legal remedies have been exhausted, and most of the points of dispute are

court decisions that have permanent legal force and are binding (Lailam, & Andrianti, 2023).

In Indonesia, the 1945 Constitution authorizes the Constitutional Court/ *Mahkamah Konstitusi Republik Indonesia* (hereinafter MKRI) with limited authority, only abstract judicial review, and without the authority to review concrete cases and constitutional complaints (Butt, 2015; Faiz, 2016; Lailam, Anggia, & Irwansyah, 2022). Abstract judicial review is an assessment of constitutional judges on the legislation-making and content of laws with potential future implications having an "erga omnes effect" (Omara, 2017) or final and binding decision (Article 57 of Law No.24 of 2003).

From the legislation system perspective, there are two consequences: (1) it makes it difficult for political institutions to pass constitutionality of laws so that the impact is that lawmakers must be extra careful in formulating a law; (2) it makes it easier for politicians to transfer defeat in parliament to the constitutional court, which is usually performed by opposition political parties (Corkin, 2010).

In the Indonesian context, based on Article 51 Law No.24 of 2003, it regulates that various parties may submit abstract judicial review, such as individuals, business entities, legal entities, State institutions, and customary law communities. It embodies the idea of checks and balances in democracy because the judicial power must review laws passed by the legislative power.

The essence of abstract judicial review is to assess the contradiction of legal norms of the statute against the values, principles, and articles in the 1945 Constitution. However, constitutional judges in

various countries may use analytical tools to compile constitutional reasoning to determine whether the law assessed is constitutional or unconstitutional. Common legal reasoning types are constitutional interpretations, proportionality analysis or balances, references to international human rights and comparative law analysis, legal and extra-legal reasoning, dissenting and concurring opinions, judicial candour and rhetoric, analogies, precedents, and others (Hailbronner, & Martini, 2017). It is also the same as the MKRI judges who are free to choose and use methods and measuring tools to assess the conflict of legal norms of the law against the 1945 Constitution. However, currently, the most method is the constitutional interpretations model.

From the international perspective, several analysis methods exist to analyze competing rights. In the literature review on Continental European and Anglo-Saxon systems, there are constitutional reasoning models in deciding competing rights, i.e.: proportionality analysis (Germany), balancing (United States), and Oakes test (Canada); and in general the method used is the constitutional interpretation.

Proportionality analysis is critical in judicial review when judges deal with a conflict between citizens' fundamental rights, public/ society, and State interests; "if you talked about human rights, you also talked about proportionality." It is a central idea in contemporary human rights law in the world (Huscroft, Miller, & Webber, 2014). Proportionality is the analysis model of competing rights from German legal and political culture (Petersen, 2017) and a doctrine or framework for examining numerous constitutional and human rights disputes. It is

recognized as a universal principle by constitutional courts and international tribunals worldwide; "the ultimate rule of law" in democracy State (Cohen-Eliya, & Porat, 2010), a value of global constitutionalism, and the "most successful" legal transplant in history (Sweet, & Mathews, 2017).

In Indonesia, the MKRI deciding on the competing rights cases must protect individual rights, the community (public), and the Nation-State based on integrative interest and proportionality. It functions to maintain the balance between "individual," "community," and "State rights." It creates balance and harmony between the people and society. However, in democratic practices, this provision is undoubtedly based on the Indonesian State ideology of the Pancasila and the rule of law paradigm. It has idealized the legal and political culture concept of "public interest above personal and group interests (*kepentingan umum diatas kepentingan pribadi*)," it prioritizes public welfare and benefits in an aspirational, accommodative, selective, and non-discriminatory manner. Hence, reviewing the conflict of legal norms also considers a balance between the values of justice, legal certainty, and legal expediency to create harmony and unity in society.

In the MKRI practices, the use of proportionality analysis still raises various academic debates; this is undoubtedly due to the unclear adoption of the international theory of proportionality. Hence, it does not apply an original Indonesian concept used as a method of analysis in deciding competing rights cases. This condition causes some decisions, not to mention proportional analysis in international theories with four stages: legitimate

aims or proper purpose, suitability, necessity, and strict sense (balancing).

Instead, the MKRI legal considerations use an unstructured, unsystematical, and uncomprehensive analysis. Stefanus Hendrianto (2020), in the article "Against the Currents: The Indonesian Constitutional Court in an Age of Proportionality," concludes that Article 28J (2) of the 1945 Constitution designs lack of constitutional protection to citizens. In addition, he said that constitutional judges have limited international academic network and understanding of the principle of proportionality from an international perspective.

The dialectic of the constitutional debate on the implementation of proportionality analysis in the MKRI has been studied by several researchers. Giri Ahmad Taufik, in the article "Proportionality Test in the 1945 Constitution: Limiting Hizbut Tahrir Freedom of Assembly," explored the use of the proportionality test in interpreting the restriction clause in the dissolution of Hizbut Tahrir Indonesia (Taufik, 2018). Hence, Bisariyadi (2018a), in the article "Legal Transplant and the Model of Constitutional Court Decision", explained that the proportionality test is an excellent legal transplant to competing rights cases.

Another constitutional expert, Andi Omara (2020), published an article entitled "Enforcing Nonjusticiable Rights in Indonesia." In his analysis, the MKRI used a "categorical-proportionality approach to decide whether the National State Budget Law of 2005 violated the Constitution. It determined whether the violation was justifiable, thus requiring a proportional review considering and weighing the above consequences and possibilities.

This article differs from the above; it focuses on elaborating the original Indonesian concept of proportionality based on the values of Pancasila and the 1945 Constitution. It is motivated by the concept of Pancasila's rule of law, legal culture, and the conception of Indonesian human rights characteristics. It has values of (a) Belief in the one and only God, (b) humanity and civilization, (c) unity in diversity, (d) deliberative democracy, and (e) social justice for all citizens. In addition, this article also focuses on the original proportionality approach in the MKRI's decisions on socio-economic competing rights.

Furthermore, Bisariyadi's article on "*Penerapan Uji Proporsionalitas Dalam Kasus Pembubaran Partai Politik: Sebuah Perbandingan* (Application of Proportionality Test in Political Party Dissolution Cases: A Comparison) explored that the sanctions imposed are not excessive to create a balance between protecting freedom of association and maintaining democratic order (Bisariyadi, 2018b). Another researcher, Irene Angelita Rugian (2021) in the article "*Prinsip Proporsionalitas dalam Putusan Mahkamah Konstitusi: Studi Perbandingan di Indonesia dan Jerman*" (Proportional Principles in the Constitutional Court Decision: Comparative Study in Indonesia and Germany) explained that the Indonesian constitutional Justice rarely used the analysis in deciding competing rights cases. Lastly, Satria Rangga Putra and Sujatmiko (2022), in the article "Reviewing constitutional court decision number 91/PUU-XVIII/2020 regarding formal review of job creation act: A progressive law perspective," stated

that, in this case, the judges used judicial proportionality to give a minor potential loss (minimally impairment) from the issuance of the decision.

The differences between the three articles above are: this article looks more at the principle of proportionality applied by the MKRI, whether using international standards or the original Indonesian proportionality models (only balancing analysis). In addition to focusing on socioeconomic rights decisions, it also looks deeper into competing rights that become an analysis issue, whether the legal arguments of competing rights cases are between legal norms or constitutional values (legal certainty, fair justice, and legal expediency).

Based on the explanation above, the questions in this study are: How the design of the proportional analysis in a global perspective and original analysis based on the spirit of the rule of law of Pancasila and the 1945 Constitution and the MKRI approach the concept of it in involving competing rights on socioeconomic cases This research is urgent to see the advantages and disadvantages of proportionality analysis applied by the MKRI and to construct a model of the Indonesian original proportionality analysis system in the socio-economic competing rights cases.

B. RESEARCH METHODS

The legal research focuses on the original Indonesian proportionality analysis model and its application in MKRI decisions, particularly competing rights cases. It used normative legal research methods to analyze the problems doctrine, principles,

and norms in the text of laws and regulations (Roisah et al., 2022). These were legislation and case approaches. The legislation approach examined various laws and regulations, and the case approach examined several cases in the Court's decisions, especially legal argumentation by judges in making decisions.

Secondary data collection using the library research technique aims to analyze primary legal materials (regulations and the MKRI decisions), secondary legal materials (books, international and national online journals, and others), and tertiary legal materials (legal dictionaries).

The data analysis used descriptive qualitative to explain the object of research by processing and analyzing the data as follows: (1) the data were systematized according to the object under study; (2) the data that had been systematized were then described, evaluated, and analysed based on the legal theory and values applied in Indonesia. Hence, the last step was to construct the research results in depth and comprehensively.

C. RESULTS AND DISCUSSION

1. Proportionality Analysis in the Global

Perspective

Proportionality analysis implements the principle of proportionality adopted and practiced in judges' and courts' legal culture systems. It is a general concept of law used by constitutional or equal courts to rationalize decision-making, mainly to supervise political authority (Hopner, 2021) and to evaluate legislation policies related to human rights laws. Proportionality analysis involves resolving the

conflict of competing rights between two or more individual rights and the public interest (Nußberger, 2014) stemming from the State's embrace of liberalism and individualism, with the final stage of the balancing test (Petersen, 2017). The German Constitutional Court was the first constitutional court to apply proportionality as an instrument of judicial review since the late 1950s (Petersen, 2017). Hence, it is spread to most European countries with judicial review systems and several Amerika, African, and Asia courts (Grimm, 2007).

Angelika Nußberger (2014) explains how proportionality is used in German legal literature to balance competing rights: "Implementing the Court's judgments is even more difficult applying the proportionality principle in a triangular or multipolar conflict where different human rights must be balanced." The German Federal Constitutional Court coined the expression "multipolar conflicts" for this phenomenon in its famous case *Görgülü* judgment."

The proportionality framework is a central legal doctrine in many democratic societies to resolve conflicts that often arise between public objectives and individual constitutional rights that may be limited by policy. It is the benchmark criterion for assessing cases that conflict between individual and State interests (Enders, 2020). However, it applies to concrete judicial review and constitutional complaint mechanisms. In most cases, without an oral meeting process in evidence, this is also a factor that the proportionality analysis assessment must be legally certain, clear, and measurable. The cases of individual constitutional complaints in Germany, where almost 98% of cases of competing rights are in

the form of conflicts between individual rights and State interests with a closed trial mechanism (without an oral meeting) (Bundesverfassungsgericht, 2022), this is certainly different from the abstract judicial review in Indonesia.

Robert Alexy says that the principle of proportionality (*Verhältnismäßigkeitsgrundsatz*) is an analytical model to decide cases in the judicial review theories and practices, and it has received international recognition from many constitutional law experts and judges (Alexy, 2014). It was in four stages:

- a. Legitimate aims/ proper purpose. Its stage raises two issues: the first is what it means to talk about a policy's "goal," and the second is which goals are legitimate and which are not.
- b. Suitability, the point of the suitability stage is to establish the extent to which the protection of rights and the legitimate goal can be achieved.
- c. Necessity/ principle of necessity (*Erforderlichkeitsprinzip*). Its analysis focuses on assessing the need for laws that override fundamental rights. If the arguments are weak, the law should be canceled.
- d. *Stricto sensu*/ strict sense (balancing). It balances a cost-benefit analysis: *strictu sensu* adequateness, appropriateness, and proportionality (Petersen, 2014). Its point of balance between competing rights in terms of value and implications. If restrictions on human rights are necessary, they must be proportionate to the impact. A comprehensive characterization of equilibrium must analyze three dimensions of

law: the analytical, empirical, and normative dimensions.

Similarly, the model is proportionality in Canada and South Korea. In Canada, the Supreme Court of Canada created the "Oakes test" in the 1986 case of *R v Oakes*. It is a two-step balancing test; (1) an analysis that aims to assess the importance of a law based on two points of pressing and substantial. (2) the proportionality analysis using three sub-tests: rationally connected, minimally impaired, and proportionate effects. In South Korea, the Korean Constitutional Courts apply a four-stage proportionality analysis: legitimate purpose, suitable, minimally impaired fundamental rights, and balancing test (Chakim, 2020).

On the other hand, there are different concepts of proportionality analysis in the United States of America, Canada, and South Korea. The American legal system determines "balancing" by the judge's spirit of judicial activism. It is similar steps necessity and suitability in the proportionality analysis. The US Balancing and German proportionality are the "doctrines" relying on specific similar "thought processes," while proportionality balancing is an "analytical procedure" and a "technique of rights adjudication". It balances interests and constitutional values in political functions (Popelier, & Van De Heyning, 2013). However, not all courts in the countries use the proportionality analysis benchmark to evaluate competing rights. German proportionality analysis is more structured, objective, and reliable than the US balancing; the US balancing test is vague, general, and lacking structure.

The principle of proportionality analysis is an internationally recognized global principle, but applying the principle adjusts the legal system and culture in the country. It has become a “global constitutionalism” commonly used in democratic societies to balance rights and legal restrictions (Taufik, 2018).

2. Proportionality Analysis in Indonesian Legal System

In the Indonesian legal culture system and the MKRI practices, the proportionality analysis method has not been formulated in a structured and comprehensive stage. To analyze whether the MKRI applies proportionality in competing rights cases, it must use the Indonesian values of Pancasila and the 1945 Constitution, not international standards or proportionality models from other countries, for example, the four stages from Germany, Canada, or South Korea. According to the argument, the legal culture of human rights law is very different; the German and Canadian human rights law concept emphasizes liberalism and individualism. On the contrary, Indonesian human rights culture is based on kinship and collectivist values, and the protection of human rights for individual and social interests must be balanced.

Lawrence M. Friedman opinion is that the legal culture is a part element of the legal system; it is values and attitudes that affect law enforcement (Rahayu et.al, 2020). Indonesia's principle of proportionality must be adjusted to the legal objectives and legal culture system based on Pancasila. It is an actual ideology to guide Indonesian people (Wisnaeni, & Herawati, 2020).

Also, the 1945 Constitution is Indonesia's highest legal norm based on Law No.12/2011 on Formation of the Law and Regulations. In addition, there are other national pillars, namely NKRI and Bhineka Tunggal Ika, as a guide to the unity of a diverse society in religion, ethnicity, culture, customs, and others. When referring to the values of Pancasila and the 1945 Constitution, the purpose of Pancasila's rule of law is to protect to create a peaceful society that reflects the principles of nationality and unity. It is the nature and character of the pluralistic Indonesian nation based on population diversity, religion, ethnicity, class, special regional conditions, and culture in society, nation, and the State.

The first principle of Pancasila, "Belief in One and only God," guides the policy direction of the legal system, human rights, and democracy in Indonesia. The Second value of Pancasila, “just and civilized humanity,” refers to and does not contradict the first principle of Pancasila; it is the philosophical basis of human rights that provides provisions for a balance between individual and community rights. In general, Pancasila and the 1945 Constitution balance citizens' fundamental rights and obligations based on one godhead, humanity, unity, democracy, and social justice in an integrative value.

The second value of the Pancasila is manifested in the form of behavior that respects human dignity, equality in society and law, love for each other as individuals, and compassion to realize a harmonious life. Hence, the fifth value of Pancasila, “Social Justice for all Indonesian people,” reflects the balance and justice of life for all citizens based on the fourth value of Pancasila on deliberative democracy

(*demokrasi permusyawaratan*). Pancasila is “*rechtsidee*” that the laws made have harmony, suitability, compatibility, coherence, and correspondence with Pancasila and the 1945 Constitution as the guiding rules for legislation-making and judicial review (Lailam, 2015).

Satjipto Rahardjo’s (2003) opinion that the Pancasila legal system is a container of various characteristics that grow and exist in Indonesia with highly distinctive values, such as kinship, fatherhood, harmony, balance, and deliberation, all of which are the basis of this legal system; legal substance, law enforcement officer, and legal culture (Lailam, & Andrianti, 2023). The original Indonesian principle of proportionality is “harmony (*serasi*), aligned (*selaras*), and balance (*seimbang*).” It is an original concept of Indonesian society that grows, develops, and is recognized as a guide in maintaining the balance of life in society. In Jimly Asshiddiqie’s opinion, the legal norm’s purpose is for the peace and harmony of interpersonal life in society. Every law and regulation must balance constitutional value between legal certainty, fair justice, and legal expediency (Asshiddiqie, 2011).

According to the rule of law based on Pancasila and the 1945 Constitution, the Indonesian State aims to realize a prosperous, safe, peaceful, and orderly State and nation. Hence, they provide the freedom that is proportional to the State’s goals, guaranteeing the protection of human rights from actions that violate government law (Rofingi, Rozah, & Asga, 2022). In such a system of life, the equal position of citizens in law and Government is guaranteed, including the guarantee of fundamental

rights regulated in the 1945 Constitution and its derivative regulations. However, implementing various functions to guarantee this position and individual rights in society must be adjusted to the outlook on life and the personality of the State and nation based on Pancasila.

Proportionality analysis emphasizes the harmony of the objectives to be achieved, the rational relationship, the steps to be taken, and the feasibility of the benefits obtained in realizing the objectives achieved with the losses suffered to constitutional rights (Putra, & Sudjatmiko, 2022). Constitutional judges need it to examine, decide, and resolve disputes specifically if they face some instances of competing rights and must be analyzed based on the priority between individual, society, and State interests.

Articles 28J (1) and (2) of the 1945 Constitution regulate the proportionality principle in human rights. Article 28J (1), “Every person shall respect the human rights of others in the orderly life of society, nation, and State.” It shows the proportionality between the rights and obligations of equal citizens, and the individual rights that are owned (in this case) must not interfere with the rights of others. Article 28J (2):

“In exercising his/her rights and freedoms, every person shall be subject to restrictions prescribed by law for the sole purpose of ensuring recognition and respect for the rights and freedoms of others and to meet just demands following moral considerations, religious values, security, and public order in a democratic society.”

These articles show that the culture of human rights law must consider the rights and obligations of every individual, society, and State to create

harmonious and prosperous conditions. In these articles, personal rights and freedoms equal citizens' obligations to other people's rights. Human rights restrictions by the Government with the legal argumentation are based on morality, religious values, security, and public order in a democratic society. Suppose this restriction is against the 1945 constitution; this restriction is canceled by the MKRI. A different perspective from Stefanus Hendrianto states that Article 28J (2) shows that the 1945 Constitution retains its authoritarian character because it provides a "blank check" for the State to restrict citizens' fundamental rights. In addition, they designed it to limit the constitutional protection of rights by requiring that these rights be equal to the State's interests (Hendrianto, 2020).

In particular, the principle of proportionality is related to socio-economy rights in Articles 31 and 33 of the 1945 Constitution. Article 31 paragraphs (1) and (2) states that every citizen has the right to education and must attend primary education. Hence, the proportionality principle in economic rights based on Article 33 (3), (4) of the 1945 Constitution regulate that: (3) "The land, water, and natural resources contained therein shall be under the control of the State and shall be used for "the greatest prosperity of the people (sebesar-besarnya kemakmuran rakyat)"; and (4) the national economy shall be organized based on economic democracy with the togetherness principle, equitable efficiency, sustainability, environmental perspective, independence, and by maintaining a balance of "national economic progress and unity." The meaning of togetherness and equitable efficiency contained in the article is the

spirit of the Constitution to realize a populist economic system based on the principle of togetherness (kinship), not the capitalistic economy that develop in liberal countries.

Hence, proportionality is in Articles 5 and 6 of Law Number 12/2011 on the Establishment of Legislation; there are several basic principles related to proportionality analysis, namely the principle of humanity, which guides that laws reflect the protection and respect of human rights and the dignity of every citizen and resident of Indonesia proportionally. This principle relates to Article 6 Letter I regarding the "principle of harmony (*serasi*), aligned (*selaras*), and balance (*seimbang*)," which requires laws to reflect the interests of individuals, society, and the nation and State. The *Fatwa* (Decree) of the Indonesian Ulema Council No.6/MUNASVI/MUI/2000 on human rights states that the understanding and implementation of human rights must consider the balance between individual and obligations of the citizen, the balance between individual and community rights, and the balance between the rights of freedom and responsibility of the citizen.

The proportionality principle in the 1945 Constitution and many regulations highlights the supremacy of law, equality before the law, and human rights to balance using force to maintain public order, national interests, and public morality (Triyana, 2022). It can be used as arguments for judicial review applications by the petitioners, as legal arguments by legal experts in trials, and as legal considerations in decision-making by judges. The MKRI decision No. 9/PUU-VII/2009 regarding the Election Law No. 10/2008 is stated in the legal

consideration that: "The principle of proportionality is a constitutional and morality principle the 1945 Constitution". It is an analysis to test the competing rights and whether the State carries out the obligation to protect, promote, enforce, and fulfill.

3. The Proportionality Analysis of the Competing Socio-Economic Rights in the MKRI Decisions

In the judicial review trial meeting at the MKRI, there are various dynamics in applying proportionality analysis, starting from using it as a legal argumentation of the petition, a constitutional expert from the President or the legislature, or other parties, up to the decision-making by the judges. The petitioner for the Oil and Gas Law case, Muhammadiyah Central Leadership et al., used the principle of proportionality as the basis for legal arguments. There has been a disproportionate and unbalanced that creates legal uncertainty causing Article 1 number 19 of the Oil and Gas Law No.22/2001 regulating that "cooperation contract is a production sharing contract or other forms of cooperation contract in exploration and exploitation activities that is more favorable to the state, and the results are used for the greatest prosperity of the people" contradicts with Article 28D paragraph (1) and Article 33 paragraphs (2) and (3) of the 1945 Constitution. It can contain the clauses that do not reflect the greatest prosperity of the people (*sebesar-besarnya kemakmuran rakyat*).

A Constitutional expert from the President in the Tax Amnesty case, Yustinus Prastowo, said, "The proportionality principle is to guide how the State allocates the tax burden to citizens in proportion to the principles of equality and ability to pay"

(Prastowo, 2016). Hence, the former MKRI judge, Maruarar Siahaan (2016), constructed a proportionality analysis in the Tax Amnesty Law case:

"... proportionality of the rights (balance) of citizens with constitutional obligations (Government) in drafting the Tax Amnesty Law when there is a clash between constitutional rights and obligations to be a fair and legitimate constitutional interest in the eyes of all the Indonesian people. It is an interpretative technique used to achieve the goal of norm constitutionality with the least harm (minimum impairment analysis in the context of proportionality Canada). It is used when there is a conflict between equal legal values.

In addition, the application of the principle of proportionality by judges is in formulating legal considerations in decision-making. Every judicial review mechanism at the MKRI uses the stages of assessment/review: First, assessing the court's authority to review the law in question. It sees whether it has the authority to test as mandated in the 1945 Constitution and the MKRI Law No.24/2003. Second, the court examines the legal standing of the petitioners. The court assesses whether the applicant has legal standing or not. It sees that the court assesses whether this law aims to regulate the interests of the applicant and what is the relationship between the applicant and this law. This stage in the German version is called legitimate aims.

Third, it is the analysis of an aspect of the petitioner's constitutional loss (*kerugian konstitusional*). Based on the MKRI decision Number 11/PUU-V/2007, the court assesses several things: The applicant's constitutional rights are regulated by the 1945 Constitution and considered impaired by the review. It must be specific (particular), actual/potential, and have a causal relationship

(*causal verband*). Hence, the implication is that if the court cancels the law, there is no longer any harm to other parties. It is a rational connection analysis, a legal causality relationship between the applicant and the law reviewed by the MKRI. It assesses whether the law has impaired the applicant's constitutional rights or not.

Fourth, it is assessing the petition with various benchmarks; one of which is proportionality analysis or "harmony (*serasi*), aligned (*selaras*), balance (*seimbang*)."¹ In assessing the subject matter of this case, constitutional judges can use various benchmarks based on the provisions in the 1945 Constitution as the leading benchmark. At the same time, the choice of instruments or concepts of international laws (including proportionality analysis) is an alternative or supporting argument.

The MKRI decision No.001-021-022/PUU-I/2003 reviewed Law No. 20/2002 on Electricity (Electricity Law). The court did not mention proportionality analysis of the competing rights in the case of unbundling the electricity system between private parties, State-owned enterprises, and the people's interests. Its verdict is that Articles 16 and 17 of the Electricity Law contradict Article 33 of the 1945 Constitution. However, the implication of canceling the norm may cause chaos in the Electricity Law System, leading to legal uncertainty in its application. It balances the interests of the people and the State; the court completely canceled all articles of Electricity Law.

The other decision is No.012/PUU-III/2005 that reviewed Law Number 36/2004 on the 2005 National State Budget (*Anggaran dan Pendapatan Belanja*

Negara Tahun/ APBN 2005). The court stated that the law was contrary to the 1945 Constitution. However, there were sufficient objective reasons for the law to remain in force. Because if the court annuls the law, it will cause chaos (governmental disaster) in the administration of State finances, leading to legal uncertainty (*rechtsonzekerheid*) and even worse consequences if it turns out that the education budget in the 2005 National State Budget is bigger than the previous one. According to Omara (2020), the decision is of the "categorical - proportionality approach. It has no text of proportional analysis, but the consideration is a form to maintain the balance of State finances.

The equal legal reasoning and balance analysis are in the formal review of the decision No.27/PUU-VII/2009 reviewing Law No.3/2009 on Indonesian Supreme Court in assessing the balance between the clash of legal values, which prioritizes the values of legal expediency over legal certainty. In this case, the MKRI found "procedural defects" in legislation-making, and the law should be canceled based on the legal certainty analysis. However, it saw the aspect of legal expediency to achieve legal objectives, so the reasons of the legal expediency and the substance of the regulation with its content is better than the amended law (Law No.14/1985). Hence, it is still valid and constitutional. In this case, the model of the proportionality paradigm dealt with the conflicts of legal certainty and expediency, but it did not mention the proportionality analysis in detail.

However, the MKRI judges understand the model of applying a balance of legal values by prioritising legal expediency for the community. It

impacts the community's fundamental rights to access a modern and trusted Supreme Court justice system. According to the former MKRI Justice, Maruarar Siahaan (2016): "In the balancing process, the court determines that a law violates one constitutional right but does not cancel it because, on balancing analysis, the benefits of constitutional values of the law outweigh the harm if the court cancels it".

Similarly, in the MKRI decisions No. 34/PUU-IX/2011 and No. 35/PUU-X/2012 reviewing Law No. 41/1999 on Forestry, the court did not mention proportionality analysis in assessing competing rights. However, its decision reflected the results of a balancing analysis between indigenous community rights and the State's interests. The Government's authority to determine the status of certain areas as forest or non-forest areas as stipulated in Article 4 Paragraph (2) letter b of the Forest Law is a form of State control over land and water that is possible under the 1945 Constitution. It provides that the determination of the area must apply legal provisions by considering the community's rights that first existed in the area. In this case, if indigenous community rights exist in the area, including traditional, property, or other rights, the Government must first make a fair settlement with the rights holders.

The forest tenure by the State is still obliged to protect, respect, and fulfill the rights of customary law. If they still exist and are recognized for their existence, community rights will be granted based on the provisions of laws and regulations, and do not conflict with national interests". It still pays attention

to the rights of customary law if they are still alive and under the development of society and the principles of the Unitary State of the Republic of Indonesia. When indigenous communities are still alive and recognized by the State, they have rights to "customary forests," not part of the State Forest.

On the contrary, competing economic rights use proportionality analysis. The MKRI decision No.36/PUU-X/2012 reviewed Law No.22/2001 on Oil and Gas. The decision approached it to request that the balancing analysis to the State are the principles of contract law in oil and gas. It is ethical so that the burden sharing on both sides is balanced, and the principle of balance is a juridical and justice principle. When a construction contract is not balanced for the parties, the contract can be considered unbalanced. The MKRI stated that the constitutional criteria for managing gas and oil from State control is contained in the phrase "for the greatest prosperity of the people (*sebesar-besarnya kemakmuran rakyat*)." In this context, proportionality analysis is the primary benchmark for assessing competing rights. It must be the basis for the State in carrying out policy, management, regulatory, and management action and supervisory functions in oil and gas management.

Hence, in the MKRI decision No. 85/PUU-XI/2013 regarding the cancellation of the Water Resources Law No.7/2004, the court used proportionality analysis to assess the law's purpose and the use of the right to water in Indonesia. It balanced the rights and obligations of the citizens. The legal reason as the basis for limiting and canceling the Water Resources Law was that the law

aims to integrate and coordinate the interests of the community. Conflicts do not occur between members of the community or within the communities, or at least these conflicts could be minimized.

The law organizes various interests by providing protection on the one hand and imposing restrictions on the other one. With the argument of balancing the objectives of this law, the restrictions on water right were under the human right and responsibility to use water resources. The essence of this proportionality analysis is the limitation of this business to maintain the balance of water use for the greatest prosperity of the people by State and Local Government, i.e.: (i) every business is prohibited from harming people's rights to water; (ii) fulfillment rights to water; (iii) considering environmental sustainability; (iv) control of business water is an absolute authority by State; (v) the main priority is given to the business water by the State and Local Government Owned Enterprises (*Badan Usaha Milik Negara dan Pemerintah Daerah*) (the MKRI decision No. 85/PUU-XI/2013).

The last case that shocked the public was the MKRI's decision No.91/PUU-XVIII/2020, formally reviewing Law No. 11/2020 on Job Creation (*Cipta Kerja*). The law was controversial from the early legislation process in the House of Representatives. In the democratic legislation-making theory, it was still an authoritarian product of legislation because the issuance process was closed and unresponsive (Sisinaru & Harijanti, 2022). In addition, the laws were political products and made inseparable from the representation of political interests (Bachmid, & Rachmitasari, 2022).

This case used proportionality analysis in legal reasoning. The court decided that Law 11/2020 was declared conditionally unconstitutional. It had a balanced argumentation of the requirements for legislation-making that must fulfill legal certainty, legal expediency, and justice. In addition, it must also consider the strategic objectives of the legislation-making. It provides an opportunity for legislators to amend Law 11/2020 based on the procedure for legislation-making that meet specific standards and methods in the form of an omnibus law which must also comply with the fulfillment of the requirements for legislation-making based on the Article 20 of the 1945 Constitution. From the point of the formal review, it has appropriately applied the proportionality analysis, but it needs to be more structured, unsystematised, and uncomprehensive.

The court rarely mentioned proportionality analysis in constitutional reasoning in the decision texts. However, the meaning and implications of this proportionality analysis are apparent in every decision. It is different; some economic rights decisions also explicitly use the term "balancing analysis (*analysis keseimbangan*)" in assessing the conflict of competing rights. Its analysis was not only a clash of norms of interests between individuals, the public, and the State. Hence, its analysis measured legal certainty, justice, and legal expediency values in an integrative way. For example, the MKRI considered the value of legal expediency for the benefit of the broader community by not canceling several laws that violate the 1945 Constitution.

In specific, proportionality in judges' decisions, the MKRI has made margins in law enforcement that

balance and integrate cohesively three principles; the principle of legal certainty, the principle of justice under the provisions of articles of the 1945 Constitution, Article 24 paragraph (1) and Article 28D paragraph (1), and the principle of legal expediency under the provisions of Article 28H paragraph (2) to produce quality decisions and to meet the expectations of justice seekers (Lailam, 2015). Article 24 paragraph (1) states "Judicial Power is an independent power to administer justice to uphold law and justice". Article 28D paragraph (1) states "Every person is entitled to recognition, guarantees, protection, and certainty of a just law and equal treatment before the law". Article 28H paragraph (2) states "Every person has the right to receive special facilities and treatment to obtain equal opportunities and benefits to achieve equality and justice." It realizes harmonious conditions as the goal of applying proportionality analysis. Harmonious in the sense that there is harmony, compatibility, harmony balance between applicable legal norms. The implication is not only the legal order or legislation system but also the order of life of the wider community and the unity of diversity in Indonesia.

D. CONCLUSIONS

Proportionality analysis is "the ultimate rule of law" with four stages of analysis in the judicial review system: legitimate aims or proper purpose; suitability; necessity; and balancing analysis. The MKRI practices must refer to legal aims based on Pancasila and the 1945 Constitution. In general, Pancasila and the 1945 Constitution emphasize a balance of citizens' fundamental rights and obligations based on

the values of divinity, humanity, unity in diversity, deliberative democracy, and social justice for all citizens. In some articles, the 1945 Constitution also textually regulates the principles of proportionality, especially proportionality in socio-economic rights. Hence, the MKRI decisions saw that applying proportionality analysis is rarely mentioned in the constitutional reasoning of the judges. Its meaning and implications are apparent in every court decision. However, some economic rights decisions explicitly use "balancing analysis" to assess competing rights cases.

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