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Cover Page Footnote

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SANCTIONING IDEAS: ALTERNATIVE INTERNATIONAL LAW ARGUMENT IN DEFENCE OF INDONESIA'S IDEOLOGICAL CURTAILMENT OF SOCIETAL ORGANIZATION

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Abstract

Engulfed in a constant ideological challenge from various societal organizations, Indonesia inflicts an ideological curtailment measure as an attempt to defend the reign of its state ideology, Pancasila. To this end, a societal organization is barred from actively adopting, developing, and spreading any teaching or idea which contradicts Pancasila. From an international law standpoint, assertion over the measure's incompatibility with human rights norms emerges. Although a portion of the justification conveyed by the Government of Indonesia did stipulate a reference to the international human rights law regime by invoking a state of emergency and a presumably regional norm, such defense is shaky at best when being confronted with the temporal nature of the state of emergency and the high threshold to ascertain a regional customary international law. This Article, therefore, proposes an alternative defense for such curtailment measures from an international law perspective. In doing so, this Article will first delve to pinpoint the ideological issue within the corpus of international law. Subsequently, by navigating through international conventions and jurisprudences, it will establish conceivable justifications for Indonesia's ideological curtailment. Finally, this Article will also observe the looming challenges and opportunities as Indonesia embraces a restrictive approach for societal organizations existing under its jurisdiction.
Keywords*: Pancasila, ideological curtailment, societal organization, freedom of expression, human rights*

Abstrak

Dilanda tantangan ideologis dari berbagai organisasi kemasyarakatan secara terus menerus, Indonesia menerapkan langkah pembatasan ideologi sebagai salah satu cara mempertahankan supremasi ideologi negara, Pancasila. Dalam hal ini, organisasi kemasyarakatan dilarang untuk secara aktif menganut, mengembangkan, serta menyebarkan ajaran atau paham yang bertentangan dengan Pancasila. Dari perspektif hukum internasional, argumentasi terkait ketidaksesuaian larangan tersebut dengan norma hak asasi manusia pun mengemuka. Meskipun justifikasi dari Pemerintah Indonesia turut merujuk pada rezim hukum hak asasi manusia international melalui penggunaan konsep keadaan darurat dan norma regional yang diasumsikan telah terbentuk, argumen tersebut goyah bila dihadapkan dengan karakteristik temporer dari keadaan darurat dan parameter yang tinggi untuk memastikan sudah terbentuknya hukum kebiasaan internasional di tingkat regional. Artikel ini oleh karenanya, menawarkan argumentasi pembelaan altenatif terkait langkah pembatasan tersebut dari perspektif hukum internasional. Terkait hal tersebut, Artikel ini pertama akan memetakan letak isu ideologi dalam kerangka hukum internasional. Kemudian, dengan menelusuri pelbagai konvensi dan putusan internasional, Artikel ini akan menjabarkan justifikasi terkait pembatasan ideologi di Indonesia. Terakhir, Artikel ini juga akan mencermati tantangan dan kesempatan yang ada dari pendekatan restriktif yang diambil Indonesia terhadap organisasi kemasyarakatan yang berada di bawah yurisdiksi Indonesia.
Kata kunci*: Pancasila, pembatasan ideologi, organisasi kemasyarakatan, kebebasan berekspresi, hak asasi manusia*

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I. INTRODUCTION

In 2017, confronted with a snowballing ideological challenge in the form of myriad activities from several societal organizations, President Joko Widodo issued Government Regulation in Lieu of Law Number 2 of 2017 regarding the Amendment of Law Number 17 of 2013 regarding Societal Organization, which was then formally upheld and transformed into Law by the House of Representatives through Law Number 16 of 2017 (hereinafter referred to as Societal Organization Law or "SOL").[1] Substantially, SOL governs the prohibition for a societal organization to adopt, develop, and spread the teaching or idea which contradicts *Pancasila,* or the state ideology.[2] Chronologically in Indonesia, it is not foreign for the state to intervene and by extension, to curtail the ideological framework of societal organization as articulated in SOL.[3] Substantially, the formulation of SOL introduces an expansion from the initial limitation governed under the previous relevant Law, wherein the scope of the curtailed ideas was notably exhaustive.[4]

Table 1. Curtailed Ideology in Indonesia

Law Number 17 of 2013	SOL
Atheism	Atheism
Communism	Communism
Marxism-Leninism	Marxism-Leninism
	Other ideas with the intent of replacing/altering Pancasila and the 1945 Constitution

From an international law standpoint, such curtailment is prone to be scrutinized due to its close nexus with the international human rights law regime as enumerated within the International Covenant on Civil and Political Rights (ICCPR) which traverses several rights such as freedom of expression, freedom of association, and freedom of thought and conscience.[5] Aware of such apprehension, from an international law perspective, two main justifications were conveyed by the government in issuing SOL, *ergo* limiting the scope of ideological framework to a societal organization.

First, the government invoked the application of Article 4(1) of the ICCPR, which stipulates that "*In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures*

[1] Natively known as Law regarding "*Organisasi Kemasyarakatan*", interchangeably, several English interpretations of this term include "Mass Organization", "Civil Society Organization", and "Societal Organization". In this paper, "Societal Organization" will be used in referring to such a term.

[2] SOL, Art 59(4)c.

[3] See *inter alia* Decision of the Provisional People's Consultative Assembly Number XXV/MPRS/1966 of 1966, Art 2 and Art 3, and Law Number 17 of 2013, Art 2 and Art 59(4).

[4] As stipulated within the Elucidation of Art 59(4) of Law Number 17 of 2013, the preceding regulatory framework governing societal organization before SOL, the curtailed ideas exhaustively comprise Atheism, Communism/Marxism-Leninism.

[5] See 1966 International Covenant on Civil and Political Rights, 999 UNTS 171, Art 18; Art 19 and Art 22.

are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."[6]

The government argued that the relentless activities of certain societal organizations which incited hatred through various means and purposefully deviated their adherence from state ideology had in essence brought Indonesia to the proclaimed state of public emergency within the ambit of the said article as chaos in the society was viable.[7] In this defense, one may argue that there exists a latent incompatibility pertaining to the temporal scope of the provisions within the two legal instruments. The invocation of Article 4(1) of the ICCPR is subject to a variety of procedural thresholds, including the temporal limitation of its applicability or its duration.[8] On the contrary, SOL is permanent in nature as it serves as the umbrella rule governing the general conduct of societal organizations in Indonesia. Thus, even after a specific societal organization that allegedly violated the curtailment as inscribed within SOL is dully sanctioned or even legally dissolved, SOL endures to be binding towards other societal organizations.

Second, by invoking the 1993 Bangkok Declaration on Human Rights which stipulates that "…*while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds*…" the government also asserted a regional norm as developed within members of the Association of Southeast Asian Nations (ASEAN) in perceiving the universal scope of human rights obligation.[9] Accordingly, the government appealed to the regional norm which arguably had crystallized in Southeast Asia. On this argument, one may negate that such norms as reflected within the 1993 Bangkok Declaration may very well be solely a reflection of soft law, thus bears no binding legal force, unlike any regional human rights convention in other areas.[10] Further, even if such declaration wanted to be treated as a regional or particular customary international law, *per Asylum Case*, the burden of proof to do so is notoriously strict, thus warrants further exposition, in particular, relating to the uniform usage of such a norm within the region, which is absent if one refers to the elucidation of SOL.[11]

Responding to these critical assessments, this Paper, therefore, is intended to stipulate an alternative defense to complement the existing international law argument as elaborated within the elucidation of SOL. In doing so, it will delve to scrutinize legitimate grounds to limit freedom of expression from Article 19 of the ICCPR to justify Indonesia's permanent nature of ideological limitation to a societal

[6] SOL, Elucidation.

[7] SOL, Elucidation.

[8] See UN Doc. CCPR/C/21/Rev.1/Add.11, General Comment on Article 4 (2001): para 4 and para 17.

[9] SOL, Elucidation.

[10] See the discussion on the definition of soft law where formal written documents signed by states but do not satisfy the benchmark of a treaty may also be classified as a soft law in Andrew T. Guzman & Timothy L. Meyer, "International Soft Law," *Journal of Legal Analysis* 2, no. 1 (Spring 2010): 172-174. See also as a comparison *inter alia* Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, ETS 5 (4 November 1950), and Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, (22 November 1969).

[11] See International Court of Justice, "Colombian-Peruvian Asylum Case," (Colombia v. Peru), Judgment of November 20th, 1950, I.C.J. Rep. 1950 p.266 (1950): 276-277, and also SOL, Elucidation.

organization and elaborate practices where freedom of expression, including on certain ideology is restricted in jurisdictions beyond ASEAN states to further demonstrate that such practice is not exclusive to the ASEAN states and drives beyond the regionality paradigm, rather than aiming to establish that such a norm had crystallized into a regional or particular customary international law.

The methodology used by this Paper will fall under the doctrinal research category, which seeks to understand what the law is in a particular area.[12] It will rely on sources of international law which include international conventions, international custom, general principles of law, judicial decisions, and teachings of the most highly qualified publicists as primary sources.[13] The structure of this Paper will be mainly divided into three parts. The first part will elucidate the understanding of state ideology through international jurisprudence and assess its nature within the confines of the sovereignty concept in international law. Going further, by observing international conventions and practices in several jurisdictions, the second part of this Paper will impart possible justifications for Indonesia's current ideological curtailment of societal organization. Finally, the third part of this Paper will scrutinize current challenges and opportunities within Indonesia's existing regulatory framework in limiting certain ideologies to be adopted by a societal organization.

II. LEGAL PLURALISM AND THE IMPENETRABLE NATURE OF STATE IDEOLOGY BY INTERNATIONAL LAW: INDONESIA'S CONTEXT

A. An International Law Perspective on State Ideology

To comprehend the position of international law on state ideology, one needs to first identify the elements which form the characterization of an ideology. Hamilton defined ideology as "*a system of collectively held normative and reputedly factual ideas and beliefs and attitudes advocating a particular pattern of social relationships and arrangements, and/or aimed at justifying a particular pattern of conduct, which its proponents seek to promote, realize, pursue or maintain.*"[14] Additionally, McClosky noted that ideology manifests as "*systems of belief that are elaborate, integrated, and coherent, that justify the exercise of power, explain and judge historical events, identify political right and wrong, set forth the interconnections (causal and moral) between politics and other spheres of activity*."[15] Dissecting the aforementioned definitions and applying them to the Westphalian concept, one can deduce that ideology relates to a state's perspective to identify its innate virtue, history, as well as its future ideals and the means to get there. Inevitably, the spectrum of ideology would vary from one state to another as each state has its own experience and comprehension of values and objectives that it wished to achieve as it was initially formed as a nation-state. To this end, one question worth to be discussed is whether such a realm may be meddled by international law.

To examine the answer to such a question, it is pertinent to first observe the relationship between international law with domestic law. Over the course of its history, international law has been functioning as a force to converge certain norms

[12] Mike McConville; Wing Hong Chui (eds.), Research Methods for Law (Edinburgh: Edinburgh University Press, 2017), 21.

[13] 1945 Statute of the International Court of Justice, 59 Stat. 1055, 3 Bevans 1179, Art 38.

[14] John Gerring, "Ideology: A Definitional Analysis," *Political Research Quarterly* 50, no. 4 (December 1997): 959.

[15] Gerring, Ideology: A Definitional…, 958.

into one global order and further penetrate a state's national legal system. Take human rights law as a corpus of international law, for instance, the process to consolidate its norms in international legal instruments and subsequently influencing a state's national regulatory framework has been apparent, transformative, and effective. Chronologically, Beth Simmons opines that. the adoption of the Universal Declaration of Human Rights (UDHR) has been widely noted as a crucial milestone in forming the international rights legal regime.[16] Such claim is profoundly substantial as following the adoption of the UDHR, multiple binding conventions were adopted and ratified by the majority of states.[17] This includes the ICCPR which as of this moment, is binding to 173 states.[18] Branching wider, the consolidated force of human rights law even goes beyond a treaty obligation, as observed by Robbins, some of the rights enshrined within the sphere of international human rights law have crystallized into customary international law.[19] The sheer magnitude of its influence at the international level even trenches deeper to the domestic level as it inspires the formulation of human rights-related provisions in various national constitutions.[20]

Notwithstanding the generally intrusive nature of international law towards the state's legal system as previously illustrated in the human rights area, certain aspects remain impenetrable and reserved ultimately as part of the state's sovereignty. Such paradigm follows the school of legal pluralism wherein a degree of fragmentation and diversity within the national legal system of varying states is preserved as opposed to forcing the world to be governed under one order.[21] Reverting to the initial question on ideology, does it stand as one of the aspects that international law aims to converge and subsequently meddle in the national level or is it categorized within the auspice of legal pluralism, therefore subject to the state's sovereignty?

Respectively, it is worth noting that in *Nicaragua*, the International Court of Justice (ICJ) edicts that a state's freedom in choosing its political, social, economic, and cultural system is the very essence of sovereignty on which the whole international law rests.[22] Such diverse values and traditions are the foundation for each state's legal system, hence forming its respective sovereignty under international law. To this end, inseparable from the discussion on the state's political system, ICJ subsequently notes that the state's choice in adhering to certain ideology falls outside the assertion of international law.[23] It further postulates that a state's subscription to any doctrine therefore cannot be equated as a breach of customary international law.[24] Axiomatically, ICJ further solidifies its stance by noting that within the ambit of

[16] Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (New York: Cambridge University Press, 2009), 42.

[17] See for example the reference to the UDHR in the preambles of the ICCPR; and the 1966 International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3.

[18] United Nations Treaty Collection, "Status of Treaties: International Covenant on Civil and Political Rights," accessed May 28, 2022, https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND.

[19] Melissa Robbins, "Powerful States, Customary Law and the Erosion of Human Rights through Regional Enforcement," *California Western International Law Journal* 35, no. 2 (Spring 2005): 281.

[20] Hurst Hannum, "The Status of the Universal Declaration of Human Rights in National and International Law," *Georgia Journal of International and Comparative Law* 25, no. Issues 1 & 2 (1995/1996): 289.

[21] David Kennedy, "One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream," *New York University Review of Law & Social Change* 31, no. 3 (2007): 641-646.

[22] Kennedy, One, Two…,641-646.

[23] International Court of Justice, "Military and Paramilitary Activities in and against Nicaragua." (Nicaragua v. the United States of America), Merits, Judgment of 27 June 1986, ICJ Rep. 14 (1986): 109, para. 207. Nicaragua para 207

[24] International Court of Justice, 133, para 263.

the Charter of the United Nations as expounded by General Assembly resolution 2625 (XXV), the coexistence of states with their various ideologies lies at the heart of the established principle of non-intervention.[25]

The premise that the ICJ has established in *Nicaragua* pertaining to the state's ideological matter, therefore, indicates a clear demarcation between the state's sovereignty and certain invasive facets of international law. The ruling is of high pertinence from an international law perspective as it sets the precedent where the state is under free rein in ascertaining any ideology it wishes to instill within its jurisdiction. This notion is no exception to Indonesia and the state ideology it adopts, which for better or worse, subsequently dictates the manner in which it governs the ideological framework for every societal organization falling under its jurisdiction.

B. Ideological Framework in Indonesia and its Limitation on Societal Organization

As previously discussed, *per Nicaragua,* international law paves the way for a state's freedom in adhering to a certain ideology as it lies within the auspice of a state's sovereignty. To this effect, Indonesia subscribes to *Pancasila* as its state ideology. The term encompasses five principles that are encapsulated within the Preamble of the 1945 Constitution of the Republic of Indonesia.[26] These principles are: *"Belief in One Almighty God." "Humanitarianism, Righteous and Civilized," "Unity of Indonesia,"* and *"Democracy Guided by Wisdom in the Consultations of Representatives*," together with the realization of *"Social justice for all the people of Indonesia."*[27]

Tracing the early process which transpired in Indonesia to adopt *Pancasila* as the state ideology, Sjafruddin Prawiranegara noted that the codification of *Pancasila* can be found initially in the speeches preceding the establishment of the 1945 Constitution, specifically in the speech of Indonesia's First President, Soekarno, on June 1, 1945.[28] Prawiranegara further observed that Soekarno particularised *Pancasila* as the "*philosofische grondslag*" of Indonesian independence which envisages "*the foundation, philosophy, the most profound thought, the spirit, and the deepest desire, upon which to build the eternal, indestructible mansion of Independent Indonesia."*[29] Concerning said historical perspective, from a geopolitical context, *Pancasila* stands as a distinguishing ideology that goes beyond the traditional classification of the 20th-century dominant political ideologies, which comprise liberalism, communism, and fascism.[30]

In a more contemporary context, from the legislation-making standpoint, serving as the foundation and ideology of the state, *Pancasila* constitutes the ultimate source of all sources of state laws.[31] Accordingly, every substantive element within any legislation must adhere to the philosophies and values enshrined within *Pancasila* and may not contradict them.[32] Conforming to such a line of effect, SOL, as the regulatory framework governing societal organization obliges societal organization with two

[25] International Court of Justice, para 264.

[26] Sjafruddin Prawiranegara, "Pancasila as the Sole Foundation," *Indonesia*, no. 38 (1984): 77.

[27] Prawiranegara, Pancasila as…, 78.

[28] Prawiranegara, Pancasila as…, 76.

[29] *Prawiranegara, Pancasila as…*,78.

[30] Yance Arizona, "The Return of Pancasila: Political and Legal Rhetoric against Transnational Islamist Imposition," *Constitutional Review* 5, no. 1 (May 2019): 166

[31] Law Number 12 of 2011 regarding Legislation Making, Art 2.

[32] Law Number 12 of 2011, Elucidation of Art 2.

consequences pertaining to its ideological feature. First, the activities of a societal organization must contribute to the development of Indonesia in conformity with the objectives as summarized within *Pancasila* and the 1945 Constitution, and second, a societal organization is prohibited to adopt, develop, and spread the teaching or idea which contradicts *Pancasila*.[33]

The latter consequence lies at the heart of the ideological curtailment on a societal organization in Indonesia. In defining the teaching or idea which is deemed to be in contradiction to *Pancasila*, the elucidation of SOL conjures two definite classifications of ideas, which are "*Atheism,*" and *"Communism/ Marxism-Leninism,"* as well as one non-exhaustive idea, which is "*other idea with the intent of replacing/altering Pancasila and the 1945 Constitution.*"

III. INDONESIA'S IDEOLOGICAL LIMITATION AS A LEGITIMATE INTRUSION ON FREEDOM OF EXPRESSION WITHIN THE SPHERE OF THE ICCPR REGIME

The ideological framework that Indonesia ascribes to a societal organization is indubitably restraining. As elaborated above, a societal organization is deterred to adopt, develop, and spread ideologies in contradiction to *Pancasila*.[34] From a domestic legal perspective, such limitation is warranted in light of Article 28J(2) of the 1945 Constitution which stipulates "*In the exercise of his/her rights and freedom, every person shall abide by the limitations to be stipulated by the laws with the purpose of solely guaranteeing the recognition as well as respect for the rights and freedoms of the others and in order to comply with just demands in accordance with considerations for morality, religious values, security, and public order in a democratic society*." However, in the international law context, such a limitation also coincides with the nature of several rights accorded within the ICCPR, which binds Indonesia under state party obligation.[35] Such as freedom of association, freedom of expression, as well as freedom of thought and conscience.[36]

For the purpose of this Paper, however, aspects relating to the freedom of expression are favored to be applied as the qualifying threshold to test the legitimacy of Indonesia's ideological curtailment in two aspects. First, due to its exceptional and central role as the enabler of human rights mechanisms and democracy. Freedom of expression can be designated as a meta right for the overarching functioning of the human rights mechanism as it enables the enjoyment of myriad other rights, including the right to assembly and association, political participation, and cultural rights.[37] The United Nations Human Rights Committee even deems such freedom reigns paramount importance in any democratic society.[38] Second, the formulation of Indonesia's ideological curtailment necessitates a specific manifestation of action by virtue of the spreading of certain teaching or ideology to the public, making the curtailment to be within the scope of *forum externum* in nature which relates more

[33] SOL, Art 1 and Art 59(4)c.

[34] SOL, Art 59(4)c.

[35] See Law Number 12 of 2005 regarding the Ratification of the International Covenant on Civil and Political Rights.

[36] See ICCPR, Art 18; Art 19, and Art 22.

[37] Michael O'Flaherty, "Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34," *Human Rights Law Review* 12, no. 4 (2012): 631.

[38] UN Doc. CCPR/C/64/D/628/1995, Tae-Hoon Park v. the Republic of Korea, Communication no. 628/1995 (20 October 1998): para. 10.3.

aptly with freedom of expression, as opposed to *forum internum* rights such as freedom of thought and conscience.[39]

In grasping the extent of the freedom of expression, this Paper is not in the position to deny that Indonesia's regulatory framework pertaining to the ideological limitation on a societal organization is indeed restrictive in its nature, rather, it argues that as restrictive as it may be, such ideological curtailment is legitimate in the eye of the ICCPR regime, as it complies with the cumulative thresholds governed by the ICCPR to limit freedom of expression, namely, prescribed by law, serving one of the aims enumerated in Article 19, paragraph 3 (a) and (b) of the ICCPR, and is necessary to achieve one of these purposes.[40]

A. Prescribed by Law

The first element that the state must comply with in limiting freedom of expression is the procedural avenue of its restriction, as it must be in the form of a law.[41] In determining whether a law is legitimate within the scope of the ICCPR regime, General Comment Number 34 of the ICCPR sets out several benchmarks to be adhered to by the state which deal with aspects relating to the product of the law, its characteristics, its accessibility, and also its punitive mechanism.[42]

First, regarding the product of the law. The ICCPR regime instructs that the law must not manifest as a traditional, religious, or customary law.[43] Conversely, it must be in the form of a written legal product to ensure compliance with the legality principle. In line with such requirements, SOL is indeed a written legal product as it is in the form of *Undang-Undang*, one of the recognized legal products within the hierarchy of Indonesia's legislation.[44] Second, regarding the characteristic of the law, the ICCPR regime mandates the law to be formulated with a precision that enables an individual to regulate his or her conduct accordingly.[45] To this end, SOL provides further elaboration on the list of the detailed curtailed ideas which bestows a degree of clarity for the relevant societal organization to hinder from.[46] Nevertheless, one particular idea requires a greater degree of interpretation, which will be further elaborated infra as part of the current challenges of Indonesia's ideological framework on a societal organization. Third, regarding the accessibility of the law. In elucidating this threshold, General Comment Number 34 highlights the existence of public access to the relevant law.[47] In conformity with such elements, Indonesia's legislation process mandates each *Undang-Undang* to be promulgated by its placement in the state gazette so that every person may access such law.[48] Finally, regarding the punitive mechanism of the law, the relevant law is prohibited from incorporating corporal

[39] See UN Doc. A/HRC/31/18, Report of the Special Rapporteur on freedom of religion or belief (23 December 2015): para 7.

[40] UN Doc. CCPR/C/83/D/1128/2002, Marques de Morais v. Angola, Communication no. 1128/2002 (29 March 2005): para 6.8. and UN Doc. CCPR/C/80/D/926/2000, Shin Hak Chul v. Republic of Korea, Communication no. 926/2000 (16 March 2004): para. 7.2.

[41] UN Doc. CCPR/C/GC/34, General Comment on Article 19 (2011): para 22.

[42] *Ibid*, para 24-27.

[43] *Ibid*, para 24.

[44] Law Number 12 of 2011, Art 7.

[45] General Comment on Article 19 (2011): para 25.

[46] SOL, Elucidation of Art 59(4)c.

[47] *Ibid*.

[48] Law Number 12 of 2011, Art 81 and Art 82.

punishment as a penalty when a violation over applicable restriction occurs, as it is deemed to be incompatible with the ICCPR.[49] To this end, corporal punishment is not accommodated by SOL, relevant provisions within SOL which dictate sanctions cover administrative and criminal sanctions in the form of imprisonment.[50]

B. Serving one of the aims enumerated in Article 19, paragraphs 3 (a) and (b)

Respectively, there are two classifications of legitimate aims that the state may invoke in restricting the freedom of expression, namely, (a) for respect of the rights or reputations of others; or (b) for the protection of national security or public order (*ordre public*), or of public health or morals.[51] Among these grounds, based on the interpretation of past precedents by the Constitutional Court of the Republic of Indonesia, this Article will seek to establish the existence of national security, and public order as conceivable purposes for the construction and implementation of SOL.

First, is the existence of national security. From an international law standpoint, finding an umbrella doctrine to define a universally accepted understanding of national security is proven to be a challenge.[52] This partially is attributed to the nature of national security which is often deemed to be a dynamic and ever-evolving concept, thus making it too difficult to be demarcated.[53] Several findings, however, can shed light to better comprehend this concept within the confine of the ICCPR. *Siracusa Principles* posit that national security is closely related to the protection of a state's existence, territorial integrity, or political independence.[54]

Another elaboration can also be found in *Jeong-Eun Lee v. the Republic of Korea*, a case brought before the Human Rights Committee concerning the legitimacy of the Supreme Court of the Republic of Korea's decision to imprison an individual who is involved in the allegedly "enemy-benefiting group" and anti-state organization.[55] In such a case, the degree of threat to national security was assessed wherein the danger to the national security must be a real danger and not a hypothetical one in order to warrant the legitimate restriction.[56] In another instance, Human Rights Committee in *V. M. R. B. v. Canada* refrains itself to evaluate the substantive element of national security that Canada invoked as a ground to deport an alien, consequently, rendering a degree of discretion to the state in evaluating the security rating when it imposes certain restriction.[57]

To this end, the ideological limitation as governed by SOL is intended to dismiss any ideology which is aimed to replace or alter *Pancasila* and the 1945 Constitution.[58]

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[49] General Comment on Article 19 (2011): para 26.

[50] SOL, Art 60, Art 61, Art 82A.

[51] ICCPR, Art 19.3.

[52] Susan Rose-Ackerman; Benjamin Billa, "Treaties and National Security," *New York University Journal of International Law and Politics* 40, no. 2 (Winter 2008): 450.

[53] Congyan Cai, "Enforcing a New National Security - China's National Security Law and International Law," *Journal of East Asia and International Law* 10, no. 1 (Spring 2017): 72.

[54] UN Doc. E/CN.4/1985/4. the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (28 September 1984): para 29.

[55] UN Doc. CCPR/C/84/D/1119/2002, Jeong-Eun Lee v. the Republic of Korea, Communication no. 1119/2002 (23 August 2005): para 2.1-2.5.

[56] *Ibid*, para 7.2.

[57] UN Doc. CCPR/C/33/D/236/1987, V. M. R. B. v. Canada, Communication no. 236/1987 (18 July 1988): para 6.3.

[58] SOL, Elucidation of Art 59(4)c.

In order to establish the connection between SOL's objective with a national security concern, one may refer to the precedent of Indonesia's Constitutional Court in interpreting SOL, wherein it postulates that both *Pancasila* and the 1945 Constitution of the Republic of Indonesia carry numerous pertinent purposes for Indonesia as a state, *inter alia*, historical facts of its declaration of independence, its form and structure as a nation and government, as well as its objective.[59] Thus, replacing the two with other ideas or teaching equally means to dismiss Indonesia of its existential foundation as a nation-state.[60] Such rationale consequently, correlates with the protection of a state's existence within the comprehension of national security concerns. At the implementation level, the determination of a specific societal organization that poses a real danger and not a hypothetical one per *Jeong-Eun Lee v. the Republic of Korea* is also done on an individualized basis with expositions of all relevant evidence, which will be further elucidated in the third element as it correspondingly relates to some facets within the necessity test.

The second is the protection of public order. Comparable with the concept of national security, searching for a fitting definition of public order in the eye of international law is also particularly tricky. Ghantous for instance notes that jurisprudences from international courts like the Permanent Court of International Justice and ICJ did not offer a precise understanding of public order.[61] Alternatively, referring to scholars' opinion, within the grasp of the ICCPR, public order is rooted in the French legal system, *ordre public,* which comprises all mandatory rules that are linked to the general organization of the state, or set of mandatory norms organizing life in society within a given state which is instrumental to the survival of the state.[62] *Siracusa Principles* further submits that public order may be understood as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded.[63]

In this regard, the ideological limitation within SOL prohibits societal organizations to adopt, develop, and spread the teaching or idea which contradicts *Pancasila*.[64] Assessing this particular proscription from Indonesia's public order perspective, one may construe that the purpose of this restriction is to deter potential clash within society provided that an expression over an idea that contradicts *Pancasila* is being promoted and spread in general public space. This line of reasoning can be inferred from the precedent of Indonesia's Constitutional Court when it examines the legality of Indonesia's blasphemy law where the Court also addresses the issue of atheism as an ideology.[65] In its judgment, the Court recognizes that one of the principles of *Pancasila, "belief in god"* which serves as the fundamental tenet of Indonesia's identity and status as a state is deeply rooted within Indonesia's society as part of their religious aspect of life.[66] Going further, the Court dismisses atheism as an ideology as it is deemed

[59] Constitutional Court of the Republic of Indonesia, Judgment of the Case Number 2/PUU-XVI/2018 (May 2019): 212-214.

[60] *Ibid.*

[61] Marie Ghantous, "Ordre Public Protection as Legitimate Aim for Freedom of Expression Restriction in the International Legal Order," *Quebec Journal of International Law* 31, no. 1 (2018): 252.

[62] Ghantous, *Ordre Public Protection*, 251.

[63] Siracusa Principles, para 22.

[64] SOL, Art 59(4)c.

[65] Constitutional Court of the Republic of Indonesia, Judgment of the Case Number 140/PUU-VII/2009 (April 2010): 273.

[66] *Ibid,* 273-275.

to be incompatible with said principle.[67] To this end, the Court determines that to a certain extent, the law governing the expression of certain interpretations of religion is necessary in order to prevent horizontal conflict and distress in society.[68] The Court then concluded that while the state is in no position to assess the substantive element of such interpretation, it still is required to govern the conduct of its people so that public order can be maintained.[69]

C. Necessity Test

The third element that the state must satisfy in justifying its restriction on the freedom of expression is the necessity test. To this end, the state is required to prove that the restriction it imposes is necessary for a legitimate purpose as previously elaborated in the second element.[70] Furthermore, the justification for the measure taken by the state in restricting freedom must also be done in an individualized fashion.[71] Subsequently, to establish the element of necessity, the state is required to indicate a causal link between the targeted expression with the purpose of its restriction.[72]

First, scrutinizing both the legal construction of SOL as well as its implementation with regards to Article 59(4) letter c, the restriction is necessary as it is intended to dismiss any ideology which is aimed to replace or alter *Pancasila* and the 1945 Constitution which as has been explained previously relates closely with two main rationales, national security by dismantling the threat over Indonesia's existential foundation and public order by preventing potential societal conflict given principles within *Pancasila* are the reflection of the collective identity of Indonesians.[73]

Second, the implementation of the restriction is also done in an individualized fashion and with a specific observation of the causal link between the expressed act with the provision relating to the ideological curtailment. An instance of such implementation is apparent in the Government of Indonesia's action toward *Hizbut Tahrir Indonesia* (HTI). HTI itself is a part of the global *Hizbut Tahrir* movement and ideology which essentially opposes the notion of democracy and nation-state.[74] It advocates for the establishment of a transnational Islamic caliphate.[75] In revoking HTI's validation as a legal entity, the government through the Ministry of Law and Human Rights when issuing Decision Letter AHU-30.AH.01.08 stipulated all the specific exhibits where HTI was deemed to have violated SOL, wherein the process also underwent layered scrutiny within the judicial branch, from the Administrative Court level to the Supreme Court, all of which upheld the government's decision, including within its substantial element regarding the ideological contradiction that

[67] *Ibid*, 273.
[68] *Ibid*, 287-288.
[69] *Ibid,* 300.
[70] General Comment on Article 19 (2011): para 33.
[71] Hak-Chul Shin v. the Republic of Korea (2004): para 7.3.
[72] UN Doc. CCPR/C/70/D/736/1997, Malcolm Ross v. Canada, Communication No. 736/1997 (26 October 2000): para 11.6.
[73] See Case Number 2/PUU-XVI/2018 (2019): 212-214 and Case Number 140/PUU-VII/2009 (2010): 287-288.
[74] Burhanuddin Muhtadi. "The Quest for Hizbut Tahrir in Indonesia." *Asian Journal of Social Science* 37, no. 4 (2009): 623–645.
[75] Muhtad, The Quest for…, 623–645.

HTI conveyed through its activities with *Pancasila* and the 1945 Constitution.[76]

Necessity also has a close nexus with the element of proportionality.[77] In this regard, a state must demonstrate that the restriction it imposes must be proportional to the value that the restriction serves to protect.[78] To this end, the degree of severity of the sanctions imposed may be used as one of the thresholds to measure proportionality.[79] Concurrently, the construction of sanctions that the government may impose when a violation of Article 59(4) letter c of SOL occurs exhibits a degree of proportionality as there exist layers within the administrative sanctions that need to be rendered first prior to the issuance of the most severe restriction measure.[80] Following the issuance of a sanction, the relevant societal organization may also file a complaint and seek remedy on the legality of the measure that the government had taken through administrative court.[81]

IV. INDONESIA'S IDEOLOGICAL LIMITATION THROUGH THE LENS OF DOCTRINES AND PRECEDENTS BEYOND SOUTHEAST ASIA JURISDICTION

Beyond the thresholds set out by the ICCPR in limiting the freedom of expression as previously elaborated, interpretation over jurisprudences from various states also manifests as an alternative justification for the restraint of certain ideologies, hence the freedom of expression. As indicated in the introduction, this chapter will focus its finding on precedents in jurisdictions beyond Southeast Asia to demonstrate that the exercise to restrict freedom of expression due to ideological concern is not an isolated practice.

A. The margin of Appreciation Doctrine

The basic premise of the margin of appreciation doctrine refers to a certain discretion given by the European Court of Human Rights (ECtHR) to the European states to reason their measure when interference or limitation over certain human rights are conducted.[82] Observing through the jurisprudence of the ECtHR, the margin of appreciation doctrine has served as the central conceptual doctrine in the institutional and jurisprudential architecture of European states in interpreting the scope of obligations under all the substantive articles within the European Convention of Human Rights (ECHR).[83] Although provisions enumerated within the ECHR are not binding to Indonesia, given the analogous nature of the substantive formulation of Article 10 of the ECHR with Article 19 of the ICCPR, jurisprudences of the ECtHR thus may serve as a tool to assist the interpretation of the provision related to the freedom of expression.[84] To further understand this doctrine, one needs

[76] Supreme Court of the Republic of Indonesia, Judgment of the Case Number 27 K/TUN/2019 (February 2019): 5.

[77] Marques de Morais v. Angola (2005): para 6.8.

[78] *Ibid.*

[79] *Ibid.*

[80] SOL, Art 61, Art 62, and Art 82A.

[81] See *Law Number 5 of 1986 regarding State Administrative Court as amended by Law Number 9 of 2004*.

[82] James A. Sweeney, "Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era." *The International and Comparative Law Quarterly* 54, no. 2 (2005): 462.

[83] Dominic Mcgoldrick, "A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee," *The International and Comparative Law Quarterly* 65, no. 1 (2016): 23.

[84] Azadeh Dastyari, "Vitalising International Human Rights Law as Legal Authority: Freedom of Expression Enjoyed by Australian Public Servants and Article 19 of the International Covenant on Civil and

to first observe *Handyside v. The United Kingdom*, a case brought before the ECtHR concerning the confiscation of obscene material possessed and dispersed to the public by Richard Handyside.[85] In such a case, the Court stipulates that in measuring the necessity when certain restriction over freedom of expression is invoked, pressing social need serves as a benchmark.[86] Further, in determining the presence of such a need, the state is bestowed with a degree of margin of appreciation.[87] This doctrine is implemented both by the prescription of the law by national authorities and by European supervision from the ECtHR.[88]

Within the ECHR regime, the margin of appreciation is applied to appraise several legitimate aims to restrict human rights, including national security and prevention of disorder or crime, which also coincide with rationales enumerated in the precedents of Indonesia's Constitutional Court as explained in the previous chapter. In the national security context, the Court dictates that the breadth of margin of appreciation for the state is a wide one.[89] The state is also considered to be better positioned than the Court in the assessment of related policy.[90] This however does not necessarily mean the Court renders the state with absolute discretion in interpreting national security.[91] Several rulings by the Court provide instances of legitimate national security concern warranting the curtailment over certain rights, including freedom of expression, on the basis of *inter alia* threat to territorial integrity with specific incitement of violence,[92] fight against terrorism,[93] and protection of state secrets.[94] While in the prevention of disorder and crime context, the ECtHR recognizes a religious aspect of the society is among the basis to restrict offensive freedom of expression which potentially could induce unwarranted and offensive manner from the society.[95] In such a context, societal construct, as well as the interpretation of the offensive nature of the expression towards religious life of the society, fall within the confine of the state's margin of appreciation.[96]

Mirroring the margin of appreciation doctrine, as elaborated in the previous chapter, the approach that Indonesia takes in rationalizing its curtailment over a societal organization is parallel to a display of a degree of state's discretion per the doctrine's understanding. Such exercise of discretion is also valid *per* several comparable rationales with the ECHR regime in interpreting the margin of appreciation

Political Rights," *University of New South Wales Law Journal* 43, no. 3 (September 2020): 844.

[85] European Court of Human Rights, Handyside v. The United Kingdom, Judgment of Application no. 5493/72 (December 1976)

[86] *Ibid*, para 48.

[87] *Ibid*, see also European Court of Human Rights, Sürek and Özdemir v. Turkey, Judgment of Application nos. 23927/94 and 24277/94 (July 1999): para 57.

[88] Handyside v. The United Kingdom (1976): para 49.

[89] European Court of Human Rights, Leander v. Sweden, Judgment of Application no. 9248/81 (March 1987): para 59.

[90] European Court of Human Rights, Klass and Others v. Germany, Judgment of Application no. 5029/71 (September 1978): para 49.

[91] *Ibid*.

[92] Sürek and Özdemir v. Turkey (1999): para 51, para 60 and para 61.

[93] European Court of Human Rights, Zana v. Turkey, Judgment of Application no. 69/1996/688/880 (November 1997): para 55.

[94] European Court of Human Rights, Hadjianastassiou v. Greece, Judgment of Application no. 12945/87 (December 1992): para 43 and para 45.

[95] European Court of Human Rights, *Otto-Preminger-Institut v. Austria*, Judgment of Application no. 13470/87 (September 1994): para 56.

[96] *Ibid*

doctrine, such as national security and public order as it is intended to maintain Indonesia's existence as a state and to prevent distress and clash within the society.[97] It is noteworthy however that, unlike the European regime, there is neither a binding regional human rights convention nor a regional court in Southeast Asia to oversee the exercise of this margin of appreciation doctrine as reflected in *Handyside v. The United Kingdom*.[98] To this end, one may still construe the resemblance over the crux of substantive aspect of judicial oversight towards executive action pertaining to the exercise of this doctrine. In such a case, the oversight subsists as it rests in Indonesia's judicial mechanism within the State Administrative Court and the Supreme Court for the challenge over the legitimacy of the government's decision in restricting certain societal organizations, and the Constitutional Court for the judicial review of the substantive element within SOL.[99]

B. Safeguarding Democratic Values

Dispersed in numerous national legal traditions and jurisdictions, the defense of democratic values serves as one of the recognized defenses for states to restrict certain human rights. Canada for instance allows a limitation of certain rights so long as its justification is within the confine of a "*free and democratic society.*"[100] South Africa subscribes to the concept of "*open and democratic society*" as *conditio sine qua non* to measure the legality of a limitation of human rights.[101] Germany utilizes the term "*free democratic basic order*" as one of the benchmarks in applying restrictions over certain rights.[102] While South Korea invokes the term "*fundamental democratic order*" to govern its political landscape.[103]

The scope of such limitation as exercised for the protection of these democratic values also extends into the freedom of expression as part of human rights. In *R v. Keegstra,* a case concerning the prosecution of James Keegstra, a high school teacher who made an antisemitic remark to his students, the Supreme Court of Canada notes that although freedom of expression poses a significant value to Canadian society,[104] it, however, may still be infringed subject to a countervailing state interest of the most compelling nature.[105] In another instance, assessing the legality of an Act which criminalizes incitement in *Economic Freedom Fighters and Another v. Minister of Justice and Correctional Services and Another,* the Supreme Court of South Africa postulates that reasonable proscription to activities and expression is permitted should they pose a threat to constitutional values and order which serve as the basis for open and democratic societies.[106]

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[97] See Case Number 2/PUU-XVI/2018 (2019): 212-214 and Case Number 140/PUU-VII/2009 (2010): 287-288.

[98] Handyside v. The United Kingdom (1976): para 49.

[99] See *inter alia Law Number 5 of 1986 regarding State Administrative Court as amended by Law Number 9 of 2004, and Law Number 24 of 2003 regarding Constitutional Court as amended by Law Number 8 of 2011, Law Number 4 of 2014, and Law Number 7 of 2020.*

[100] Consolidation of the Canadian Constitution Acts 1867 to 1982, Section 1 of the Charter of Rights and Freedoms.

[101] Constitution of the Republic of South Africa no. 108 of 1996, Section 36.

[102] Basic Law for the Federal Republic of Germany of 1949, Art 18.

[103] Constitution of the Republic of Korea, 1987, Art 8(4).

[104] Supreme Court of Canada, R. v. Keegstra, 3 SCR 697 (December 1990): 704

[105] *Ibid.*

[106] Constitutional Court of South Africa, Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another, Judgment of Case CCT CCT 201/19 (November 2020): para 33.

Observing the Federal Constitutional Court of Germany's precedents, Weiss concludes that the freedom of expression is not absolute and may be limited by general laws under the Civil Code or balanced in light of all of the circumstances against other fundamental rights protected by the Basic Law.[107] In a more ideological nuance, Sung Ho Kim theorizes that to a certain extent the nature of South Korea's Constitution is indivisible with its historical context in opposing communism as an idea.[108] Kim further notes that the explication of this ideological identity channels itself into a more specific area of domestic law through the adoption of South Korea's National Security Law.[109] As maintained by South Korea's Supreme Court and Constitutional Court, National Security Law serves as one of the legal grounds to curb freedom of expression for which national security concern is in jeopardy.[110]

Navigating through those legal instruments and case laws, one may substantiate that the practice to curtail freedom of expression to safeguard democratic values persists both beyond the ICCPR paradigm and legal framework in Southeast Asian states. Such practice is intermittently even intended to banish the spread of certain ideology which is considered to be in contradiction with the fabric of democratic values. In South Korea's context, Kwang-Yeong Shin notes that the application of South Korea's National Security Law has been characteristically noticeable to deter communism as an ideology since 1948.[111] While in Germany, the design of the Basic Law is framed with the intention to diminish the tenets of Nazism as an ideology.[112] Correspondingly, this Paper submits that the legal construction of SOL which in essence is designed to deter any teaching or idea to replace *Pancasila* and the 1945 Constitution could also be regarded as a means to uphold democratic values. Scrutinizing the constitutional structure of the human rights framework in Indonesia, relevant provision mandates the principle of a democratic state based on the law to be the overarching notion in governing the enforcement and protection of human rights.[113] Subsequently, legitimate limitations over certain rights, including the freedom of expression must be justified within the comprehension of a democratic society.[114]

V. INDONESIA'S IDEOLOGICAL CURTAILMENT: CHALLENGES AND OPPORTUNITIES

Even if, as substantiated in the previous chapter, several conceivable justifications from an international law perspective for the ideological curtailment in Indonesia could be accepted, several challenges remain looming given the existing construction and implementation of SOL. These challenges, at the bare minimum, resonate with two alarming concerns, namely, the expansive characteristic of Indonesia's ideological curtailment on societal organization and the absence of an external judicial mechanism

[107] David E. Weiss, "Striking a Difficult Balance: Combatting the Threat of Neo-Nazism in Germany While Preserving Individual Liberties," *Vanderbilt Journal of Transnational Law* 27, no. 4 (November 1994): 921-923

[108] Sung Ho Kim, "Constitutional Revolution Redux: Postwar Japan and South Korea," *Yonsei Law Journal* 10 (2020): 100-101.

[109] Ho Kim*, Constitutional Revolution,* 100-101.

[110] Whiejin Lee, "The Enforcement of Human Rights Treaties in Korean Courts," *Asian Yearbook of International Law* 23 (2017): 100-102.

[111] See generally, Kwang-Yeong Shin, "The Trajectory of Anti-Communism in South Korea," *Asian Journal of German and European Studies* 2, no. 3 (2017).

[112] Weiss, "Striking a Difficult Balance," (1994): 901.

[113] Constitution of the Republic of Indonesia of 1945, Art 28I (5).

[114] *Ibid*, Art 28J (2).

to control and supervise the implementation of such curtailment.

First, is the relatively expansive nature of Indonesia's ideological curtailment. Within the elucidation of the relevant article in SOL, there are three classifications of ideas that are being curtailed to a societal organization, which consist of "*Atheism", "Communism/ Marxism-Leninism"*, and "*other ideas with the intent of replacing/ altering Pancasila and the 1945 Constitution*".[115] Dissecting further the character of the aforementioned ideas, one can find that their nature is not always equivalent in their construction. Two types of ideas arguably afford a greater precision to be defined than the other, namely Atheism, and Communism/ Marxism-Leninism. The latter even could be traced in Indonesia's historical context.[116] Therefore is sequential in nature and may be identified as a memory law.[117] However, the third classification, "*other idea with the intent of replacing/altering Pancasila and the 1945 Constitution*", may pose a distinctive challenge in the implementation sequence as it does not necessarily deal with a memory law nor is strictly classified into a certain school of thoughts, rather it is established itself as a non-exhaustive element where a degree of a more advanced interpretation is detrimental.

Second, is the absence of an external judicial mechanism for the implementation of ideological curtailment. Unlike several other regions which are equipped with regional human rights courts with the power to supervise and control the implementation of regional human rights conventions including the extent of the assessment of the legality of national executive action, Southeast Asia, as of this moment does not have an analogous mechanism.[118] Furthermore, currently, Indonesia is also not a party to the First Optional Protocol to the ICCPR.[119] Thus, at the very least, the quasi-judicial supervision from Human Rights Committee for individual complaints procedure is also absent. This absence of an external judicial mechanism conversely puts the gravity of the supervision of decisions taken by Indonesia's government pertaining to SOL solely rests within the confine of Indonesia's national legal and institutional framework.

Despite these challenges, with several relevant strategies, myriad opportunities lie ahead to construct a lasting legal framework capable of tackling ideologically induced predicament. First regarding the non-exhaustive element of the third classification of the curtailed ideology within SOL. As previously discussed, threats to national security or public order are incessantly developing, thus necessitating a dynamic legal regime to overcome them. It is within the intention of the drafter of SOL to formulate a lasting legal framework to address this everchanging landscape as the previous SOL with a non-exhaustive list of ideas was proven to expose itself to a legal vulnerability in keeping up with the changing ideological challenge.[120] On one hand, this provision may be considered to be a potentially overboard formulation, however, on the other hand, this is precisely where the opportunity rests, and will sequentially correspond

[115] SOL, Elucidation of Art 59(4)c.

[116] See Decision of the Provisional People's Consultative Assembly Number XXV/MPRS/1966 of 1966.

[117] See the discussion on memory law in Klaus Bachmann et al., "The Puzzle of Punitive Memory Laws: New Insights into the Origins and Scope of Punitive Memory Laws," *East European Politics and Societies* 35, no. 4 (November 2021): 996–1012.

[118] See European Convention for the Protection of Human Rights and Fundamental Freedoms (1950): Art 19 and Art 46, and American Convention on Human Rights (1969): Art 33 and Art 62.

[119] United Nations Treaty Body Database, "Acceptance of Individual Complaints Procedures for Indonesia," accessed May 29, 2022, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=80&Lang=EN.

[120] SOL, Elucidation.

with the second challenge as stipulated above.

Roscoe Pound once conspicuously posited that "*the definition of law has been the battle ground of jurisprudence*."[121] To this end, through their jurisprudences, Indonesia's judicial branch collectively is in the utmost pertinent juncture to define and safeguard the implementation phase of SOL. Shiv Bedi in noting the role of judges, both in the national and international context, opines that during their engagement in the judicial process, judges develop and create law from within the existing law.[122] In this regard, Bedi highlights the extent the judicial branch may undergo in clarifying the law. Similarly in Indonesia's context, judges are also in the best position to develop a lasting qualifying legal test to strike the balance between the restriction imposed to overcome ideological challenges and the guarantee of the continuation of democratic values as enumerated within Indonesia's Constitution. To do so, although foreign to be unswervingly applied in civil law tradition, the judicial philosophy enshrined within the maxim, "*stare decisis et non quieta movere,*" or as the late Henry Campbell Black put it, "*to abide by the precedents and not to disturb settled points*," may bequeath several compelling advantages.[123]

The discipline of strictly and consistently holding past established decisions will bestow society with better legal certainty.[124] In this regard, should the formulation to determine legitimate restriction within SOL by Indonesia's judicial branch be consistently upheld between one judgment to another, between one chamber of the court to another, the society will indubitably be better served as the direction to erroneously interpret SOL could be immensely descended? Further, *the Stare Decisis* principle is predicated on the search for applicable doctrine through the process of reasoning, illustrations, arguments, analogies, or references between relevant facts of one case to another.[125] It drives the court to be thorough and precise in interpreting and expounding the law. Through this process, as more cases are analyzed by the court and steadily upheld, the more norms that can be deduced in elaborating the curtailment as stipulated in SOL, thus making it easier for society to comprehend the implementation models of SOL through these consistent precedents. Invariably, in advancing the quality of its judgment, Indonesia's judicial arm should also be extensive and refuse to restrain itself in the quest to invent the ideal qualifying test for the implementation of SOL by exploring norms enshrined within jurisprudences of other advanced legal traditions. In R v. Keegstra for instance, the Supreme Court of Canada avails itself with the opportunity to comparatively examine the benchmark in restricting certain rights through the precedent of the Supreme Court of the United States.[126]

Second, the reliance on Indonesia's national legal and institutional system should not constantly be construed as a quandary. As the notion of legal pluralism dictates, even amid the crippling grip of international order, there are fragments of law, given their characteristics, that will be better left within the auspice of the domestic legal realm. Similarly, as has been discoursed before, aspects relating to ideology, the extent of national security, and public order warrant a degree of discretion within the ambit

[121] Roscoe Pound, "Theories of Law." *The Yale Law Journal* 22, no. 2 (1912): 116

[122] Shiv R. S. Bedi, *The Development of Human Rights Law by the Judges of the International Court of Justice* (Portland: Hart Publishing, 2007), 17.

[123] H. Campbell Black, "Principle of Stare Decisis," *The American Law Register* 34, no. 12 (1886): 745.

[124] Black, Principle of Stare, 746.

[125] Black, Principle of Stare, 751.

[126] R. v. Keegstra (1990): 738-744.

of the state's domestic legal framework. What is pivotal then is to ensure the good working of a national legal and institutional system so that SOL could be reasonably executed. As the previous point has established, the judicial branch is immensely instrumental to develop a qualifying test that is cogent, consistent, and precise. To sustain this strategy, the judicial branch would require the participation of society as the trigger to activate its scrutiny both on the implementation of SOL and the constitutionality of SOL. From a public advocacy standpoint, incumbent upon such a process is the opportunity for the society to construct a well-thought element to elucidate SOL under their argument before the court. This line of reasoning follows the premise that Pound once described where through judicial experience and actual cases, elements within the society may infuse order of ideas which the courts may use and consequently develop into a modern system,[127]

VI. CONCLUSION

At the outset, it is palpable that the state's ideological subscription*, as in the case of Nicaragua*, rests within the sphere of the state's sovereignty. However, when it comes to the implementing avenue of such an ideology within a national legal framework, *inter alia* curtailment measure dedicated to upholding such an ideology, the state is not necessarily immune from further scrutiny, particularly as it may correspond to the protection of certain rights within the corpus of human rights regime. To this end, in an effort to embolden, or rather, defend *Pancasila* as its state ideology, Indonesia inflicts a degree of ideological curtailment on all societal organizations existing under its jurisdiction wherein they are barred to adopt, develop, and spread the teaching or idea which contradicts *Pancasila*.[128]

Such curtailment in essence warrants further justification from an international law standpoint as it intersects with the protection of certain rights, in particular freedom of expression. Complementing the government's views which gravitate on the invocation of Article 4(1) of the ICCPR and the 1993 Bangkok Declaration of Human Rights, this Article offers an alternative defense. To validate the ideological curtailment levied on societal organizations, this Article attempts to establish that SOL as the regulatory framework for such curtailment has met the thresholds to limit the freedom of expression as governed under Article 19 of the ICCPR, which comprises three main elements: prescribed by law, serving one of the aims enumerated in Article 19, paragraph 3 (a) and (b), and is necessary to achieve one of these purposes. In addition, beyond said ICCPR paradigm, by steering through jurisprudences from various jurisdictions, this Article also invokes the margin of appreciation and the safeguarding democratic values doctrines as an alternative possible justification for Indonesia's ideological curtailment.

While the main objective of this Article is to reason an ideological curtailment measure, it is not oblivious to the propensity that incumbent upon this type of legislation is the latent harm and abuse provided that the implementation level by the executive branch is not stringently checked and supervised. With that said, the judicial branch is rightly positioned, not only to check the executive's action but also to formulate a lasting qualifying legal test to balance the interest in upholding certain ideologies with the protection of human rights as it interprets SOL through

[127] Roscoe Pound, "Social Problems and the Courts," *American Journal of Sociology* 18, no. 3 (1912): 338-339.

[128] SOL, Art 59(4)c.

its judgments. In Indonesia's setting, to do so, this Article proposes the consistent use of *the stare decisis* principle and the extensive comparative analysis of other established precedents beyond Indonesia. Inherently, the key to such an overall process is the active participation from the society in every legal avenue pertaining to SOL, especially those which correlate with the judicial branch as it cannot initiate a proceeding without the submission from the relevant party, including the society.

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